Supreme Court, U. S.
FILED
JAN 14 1974
MICHAEL RODAK, JR., CLERK

No. 73-1106

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

This case arises out of the contest between petitioners and respondents over which competing delegation should be seated to represent the Chicago districts at the 1972 Democratic National Convention which opened in Miami, Florida on Monday, July 10, 1972. This credentials contest was the subject of this Court's decision in *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972) (considered together with the case involving the California credentials contest and decided *sub nom. O'Brien* v. *Brown*) (included

as Appendix A hereto), announced at a special term on the evening of Friday, July 7, 1972.

This Court determined to stay the judgments of the United States Court of Appeals for the District of Columbia in both the Chicago and California cases so that the Democratic National Convention could exercise its historical right "to accept or reject, or accept with modification, the proposals of its Credentials Committee." This Court stated in its *per curiam* opinion that "it has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated" and this Court emphasized "the large public interest in allowing the political processes to function free from judicial supervision."

Petitioners (the alternative Chicago delegates seated by the Credentials Committee and subsequently by the Convention itself) submit that the July 7 decision of this Court established conclusively that, in the particular circumstances of this case, the Democratic National Convention—and not the courts—was to decide the Chicago credentials contest.

This contest now comes before this Court again because, notwithstanding the July 7 decision of this Court, on the next evening, July 8, 1972, respondents (the unseated Chicago delegates who had themselves instituted the action which resulted in this Court's decision) sought and obtained from the Circuit Court of Cook County an injunction purporting to bar petitioners from participating in the Democratic National Convention. Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, has commenced con-

tempt proceedings in which petitioners are threatened with fines or jail sentences for participation in the Democratic National Convention in alleged violation of the Circuit Court's injunction. In addition, on August 2, 1972, the Circuit Court of Cook County issued a supplemental order enjoining petitioners from participating in the selection of members of the Democratic National Committee from Illinois. The orders of the Circuit Court of Cook County were upheld on appeal by the Illinois Appellate Court (First District) and the Illinois Supreme Court declined to review the judgment of the Appellate Court.

Petitioners respectfully pray that this Court grant a writ of certiorari to the Illinois Appellate Court and summarily reverse the judgment below on the authority of *Keane* v. *National Democratic Party* or, in the alternative, review the substantial Federal questions raised by the judgment below.

OPINION BELOW

The opinion of the Illinois Appellate Court, reported at 14 Ill. App.3rd 460, 302 N.E.2d 614 (1973), is included as Appendix B hereto.

JURISDICTION

The opinion and judgment of the Illinois Appellate Court were entered on September 12, 1973. On November 29, 1973, the Supreme Court of Illinois denied, without opinion, petitioners' timely motion for leave to appeal to that court the decision of the Illinois Appellate Court (Appendix K). No further review in the Illinois courts can be had.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the injunctions issued by the Circuit Court of Cook County against participation by petitioners as delegates in the 1972 Democratic National Convention were barred by the prior decision of this Court in *Keane* v. *National Democratic Party*?

2. Whether an injunction against the participation in a National Political Party Convention, and in other National Party affairs, of persons seated in said Convention by its Credentials Committee, and by vote of the delegates to the Convention, violates the Constitutional rights of free political association of said persons and said National Political Party and its members?

3. Whether state law exclusively governs the selection and seating of delegates to a National Political Party Convention, and participation in other National Party affairs, notwithstanding applicable rules and decisions of the National Political Party?

4. Whether petitioners' right to a fair hearing as guaranteed by the due process and equal protection clauses of the United States Constitution was denied in view of the public statements of the trial judge concerning this case demonstrating a gross bias and prejudice against petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article VI, Section 2 (the Supremacy Clause) and the First and Fourteenth Amendments.

STATEMENT OF THE CASE.

Respondents are those persons who were elected as delegates to the 1972 Democratic National Convention from the Chicago districts on March 21, 1972. Petitioners are the members of an alternative delegation which the Credentials Committee of the Democratic National Convention, and subsequently the Convention itself, decided should be seated at the Convention in lieu of respondents because of violations by respondents of Rules of the National Democratic Party which, among other things, prohibited closed and secret slatemaking and discrimination by party officials on grounds of race, sex or age.

The challenge against the seating of respondents in the 1972 Democratic National Convention was filed with the Acting Chairman of the Credentials Committee on March 31, 1972. Under the National Democratic Party Rules, the Acting Chairman of the Credentials Committee appointed a Hearing Examiner to hear evidence on the challenge and determine whether National Party Rules had been violated. Cecil F. Poole, former United States Attorney for the Northern District of California, was appointed Hearing Examiner on the Chicago challenge.* Examiner Poole held hearings in Chicago on May 31, June 1 and June 8, 1972. Both sides were represented by counsel and oral and documentary evidence was received. The proceedings were reported by certified court reporters resulting in a transcript approximating 2,000 pages. More than 500 exhibits, including affidavits and other documents, were introduced.

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* Initially Mr. Louis Oberdorfer, a member of the bar of the District of Columbia, was appointed Hearing Examiner; however, Mr. Oberdorfer declined to serve after allegations were made by respondents at a pre-hearing conference that he had a conflict of interest with respect to the contest.

The Examiner's Report on the challenge against respondents is included as Appendix C hereto. The Examiner found:

> ". . . [T]he challenged slate of delegates [respondents] was selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago . . . to the exclusion of other candidates not favored by the organization and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate." (at p. C-2)
>
> "[T]here was a clear concert of act and deed among officials of the regular party organization in Chicago . . . to accomplish the private selection of delegates, thereafter to put the full weight, authority, prestige and support of the organization behind the candidacies of those thus chosen, and to discourage and render ineffective efforts by those outside the penumbra of the party's influence." (at p. C-3)
>
> "[T]he violations of [the Rules] were deliberate, covert and calculated." (at p. C-3)

With regard to participation by racial minorities, women and young people, the Examiner expressly rejected any interpretation of the National Party Rules as involving a "quota" system, stating that "any such principle would be encumbered by grave doubt in any case." (at p. C-4) The Examiner found that "the Party [in Chicago] has failed in its basic obligation to open up to fuller participation by those who have been excluded" (at p. C-4) and that "the selectivity [in slatemaking] which so heavily favored entrenched office holders and regulars was also operative in the choosing of women, the young and racial minorities, and that it discriminated against them invidiously and substantially." (at p. C-21)

On Friday, June 30, 1972, the Credentials Committee of the 1972 National Convention (consisting of representatives of each state delegation), after hearing argument on the contest, voted to sustain the Examiner's Report and to seat petitioners as the delegates from the Chicago districts in light of respondents' "deliberate, covert and calculated" violations of National Party Rules. The 1972 Democratic National Convention, at its opening session on Monday, July 10, 1972, upheld the decision of the Credentials Committee.

Respondents' Federal Court Action and This Court's Decision of July 7, 1972

On Monday, July 3, 1972, following the decision of the Credentials Committee, respondents petitioned the Federal District Court for the District of Columbia to reverse the Credentials Committee's decision and to order the National Democratic Party and the National Convention to seat respondents, and not petitioners, as the Chicago delegates.*

The District Court dismissed respondents' action on July 3, 1972. The District Court's decision was sustained by the Court of Appeals for the District of Columbia Circuit on Wednesday, July 5, 1972. *Keane* v. *National Democratic Party*, 469 F.2d 563 (D.C. Cir. 1972) (included

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* Respondents' complaint (originally filed May 19, 1972) requested of the Federal court among other things:

> "That this Court declare, adjudge and decree that Plaintiff and the Delegates [respondents] have been duly elected in accordance with the provisions of the Illinois Election Code, and that they are, therefore, entitled to take their seats as delegates and alternates to the 1972 Democratic National Convention and to function and participate fully therein without interference by or on behalf of Defendants." Complaint of Thomas E. Keane, et al. for Declaratory and Injunctive Relief, Civ. No. 1010-72 (D.C. Dist. Ct. at p. 13).

as Appendix D hereto). The Court of Appeals noted that "in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by state law." (at p. D-20) The Court of Appeals further stated that:

> "The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself." (at p. D-17)

Advised by counsel for petitioners at oral argument that even if respondents were unsuccessful in their Federal court action, they would seek to proceed in an Illinois state court to enjoin petitioners from participating in the National Convention on the ground that only the delegates elected under Illinois law could be seated, the Court of Appeals, having expressly rejected that claim, enjoined respondents "from taking action in any other court that would impair the effectiveness and integrity of the judgments of this Court." (at p. D-24) At the same time, in a companion case instituted by the delegates elected under California law who had been denied a portion of their Convention seats by the Credentials Committee, the Court of Appeals reversed the decision of the Credentials Committee on the ground that the Credentials Committee's decision on the California challenge was not made in accordance with applicable National Party Rules and violated the due process clause of the Fourteenth Amendment. (at pp. D-2—D-13)

The National Democratic Party (seeking to uphold the 1972 National Convention's right to freely decide the contests) and respondents then sought relief from this Court. On the evening of Friday, July 7, 1972, at a special session, this Court stayed the judgments of the Court of Appeals in both cases, stating that it did so in order to permit the decisions on both the Illinois and California contests to be made by the 1972 Convention. This Court's *per curiam* opinion noted that:

> "The particular actions of the Credentials Committee on which the Court of Appeals ruled are recommendations that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee." (at pp. A-2-A-3)

This Court emphasized the historical right of the national party conventions to decide credentials contests:

> "Judicial intervention in this area traditionally has been approached with great caution and restraint. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (CA 8 1968), affirming 287 F. Supp. 794 (D.C. Minn. 1968), and cases cited; *Lynch* v. *Torquato*, 343 F.2d 370 (CA 3 1965); *Smith* v. *State Exec. Comm. of Dem. Party of Ga.*, 288 F. Supp. 371 (ND Ga. 1968). Cf. *Ray* v. *Blair*, 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4)

This Court concluded:

> "In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from

> the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed." (at p. A-5)

This Court's stay order had the effect of preventing enforcement of the California decision of the Court of Appeals against the 1972 Convention (enforcement of which would, as this Court noted, have "denie[d] to the Democratic National Convention its traditional power to pass on the credentials of the California delegates"). But nothing in this Court's opinion suggested that it intended its stay order to permit relitigation of the issues in another judicial forum. On the contrary, this Court expressly stated that it was acting to permit the political process of the Convention to function free from judicial supervision. This Court stated:

> "We recognize that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-5)

The Court of Appeals' Decision of February 16, 1973

Subsequent to the Convention, on October 10, 1972, this Court (on motion of the National Democratic Party) vacated the judgment below and remanded *Keane* v. *National Democratic Party* to the Court of Appeals for the District of Columbia for a determination as to whether the case had become moot. *Keane* v. *National Democratic Party*, 409 U.S. 816 (1972). On February 16, 1973, the Court of

Appeals held (in an opinion included as Appendix E hereto) that the case was moot insofar as it involved respondents' complaint against the seating of petitioners in the National Convention, stating: "In the period intervening since the action of the District Court [July 3, 1972] the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by Plaintiffs Keane, et al. in the District Court" (at p. E-2). Thus, the Court of Appeals expressly acknowledged and held, on remand from this Court, that, under the July 7 decision of this Court, the 1972 National Convention had the right to decide the Chicago credentials contest and to seat petitioners as the Chicago delegation. The Court of Appeals expressly reaffirmed the District Court's previous dismissal of respondents' action. (at p. E-2)* The Court of Appeals was asked by petitioners to enjoin any further proceedings by respondents against petitioners in the Illinois courts, but the Court of Appeals declined to do so stating it was of the opinion that "no exceptional circumstances appear to justify now the relief requested." (at p. E-3)**

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* On February 22, 1973, respondents moved to have the Court of Appeals revise its opinion and vacate the judgment of the District Court arguing that "the Court erred in affirming the judgment of the District Court." The Court of Appeals denied respondents' motion.

**It may be noted that the National Democratic Party urged the Court of Appeals that direct appeal through the Illinois courts, rather than a collateral Federal injunction, provided petitioners an appropriate avenue of relief from the Illinois injunction orders. See also *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (Mr. Justice Rehnquist, in Chambers) (at p. H-7).

Respondents' State Court Action and the Injunctive Orders Appealed From Herein

Respondents instituted the state court action which is the subject of this petition on April 19, 1972, requesting the Circuit Court of Cook County to enjoin prosecution of the challenge by petitioners on the ground that respondents, and no other persons, could lawfully participate in the National Convention as delegates from the Chicago districts. On April 20, 1972, petitioners filed a petition for removal of the action to the Federal District Court for the Northern District of Illinois on the ground that respondents' assertion of the supremacy of state law in the selection of National Convention delegates was properly characterized as a claim under Federal law. On May 17, 1972, the Federal District Court remanded the case to the state court on the ground that the Constitutional issues arose only in defense and therefore did not support removal. *Wigoda* v. *Cousins*, 342 F. Supp. 82 (N.D. Ill.) *aff'd per curiam* (7th Cir. 1972) (included as Appendix F hereto). In remanding the case, the District Judge Hubert L. Will noted:

> "This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. *The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party or the convention.*" [emphasis added] (at p. F-6)

Despite the remand of the case, action in the state court was delayed as a result of intervening Federal proceedings, including a Federal injunctive action instituted by petitioners under 42 U.S.C. § 1983,* and thus none of the actions of the Illinois court which are the subject of this petition occurred until after this Court's decision of July 7, 1972 in the Washington, D.C. Federal court action commenced by respondents in an effort to reverse the decision of the Credentials Committee.

On Saturday, July 8, 1972, following the decision of this Court on July 7, 1972, respondents sought and obtained from the Circuit Court of Cook County the injunctive order purporting to bar petitioners from participating in the 1972 Convention. (The July 8 order of the Circuit

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* On May 25, 1972, Federal District Judge Frank J. McGarr granted a temporary restraining order (and subsequently a preliminary injunction) against prosecution by respondents of their state court action for an injunction against petitioners' participation in the political process of the National Democratic Party. *Cousins* v. *Wigoda*, Civil No. 72 C 1108 (N.D. Ill. May 25, 1972, June 9, 1972). On June 29, 1972 the Court of Appeals for the Seventh Circuit (in a 2-to-1 decision) reversed the lower court injunction, citing principles of Federal-state comity. *Cousins* v. *Wigoda*, 463 F.2d 602 (7th Cir. 1972) (included as Appendix G hereto). On July 1, 1972, Mr. Justice Rehnquist denied a petition for a stay of the order of the Seventh Circuit. *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (included as Appendix H hereto). Immediately following the decision of the Seventh Circuit on June 29, 1972, the Circuit Court of Cook County did issue an *ex parte* temporary restraining order which purported to bar the submission of names of an alternative delegation to the Credentials Committee; however, that order subsequently expired by its terms and was not the subject of any further proceedings. On Wednesday, July 5, 1972, advised of the decision of the Court of Appeals for the District of Columbia Circuit that morning (see pp. 7-8 *supra*), the Circuit Court of Cook County indefinitely stayed further proceedings in the state court action and there were no further proceedings in the state court until July 8, 1972, after this Court's decision of July 7, 1972.

Court of Cook County is included as Appendix I hereto.) The July 7 decision of this Court was presented to the trial judge and attorneys for petitioners argued that this Court's decision was controlling as to the issues in the case and barred judicial interference with the proceedings of the 1972 Democratic National Convention. Petitioners further argued that any injunction would violate Constitutional rights of petitioners and the National Democratic Party. The trial judge stated that he had read the opinion of this Court, but nevertheless on the evening of Saturday, July 8, 1972 issued the initial injunction appealed from herein.

Post-Convention Actions of the Circuit Court of Cook County

Under the Rules of the National Democratic Party adopted at the 1972 Convention, the delegates seated at the Convention were entitled to choose the new Illinois members of the Democratic National Committee to serve until the 1976 National Convention, and a caucus of the Illinois delegation was scheduled to be held in Chicago for this purpose on August 5, 1972, several weeks after the Convention. On August 2, 1972, the Circuit Court of Cook County, as supplemental relief in this action, issued an order barring petitioners from participating in that caucus, although petitioners had been seated as the Chicago delegates by the 1972 Convention.* (The August 2, 1972

*At that time petitioners and the National Democratic Party sought emergency injunctive relief against the Illinois state court proceedings from the Court of Appeals for the District of Columbia Circuit; however, that court declined to intervene stating that it was "not an appropriate forum" for such proceedings. *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. August 3, 1972). Petitioners also unsuccessfully sought emergency relief from the Supreme Court of Illinois.

order of the Circuit Court of Cook County, which is also appealed from herein, is included as Appendix J hereto.) As a result of the Circuit Court's order, respondents, and not petitioners, participated in the August 5 caucus. Petitioners immediately filed with the Democratic National Committee notice of intent to challenge the results of the August 5 caucus under National Party Rules and to call a new caucus to choose members of the Democratic National Committee in accordance with the Rules at such time as the order barring petitioners from exercising their rights as delegates granted by the 1972 Convention should be vacated on appeal.

Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, has caused to be served on 62 of the petitioners rules to show cause why they should not be held in contempt for participation in the Democratic National Convention in violation of the July 8, 1972 injunction of the Circuit Court of Cook County. Criminal trials for contempt have been deferred by the Circuit Court of Cook County conditioned on rapid prosecution by petitioners of this appeal, with bi-monthly status calls. In response to motions by petitioners, the trial judge has stated that jail sentences imposed will not exceed six months and that, therefore, petitioners have no right to trial by jury. Attorneys for respondents have submitted an extensive list of witnesses to be called to testify at the criminal trials and the trial judge has stated that the trials may be lengthy.

Public Statements by the Trial Court Judge

Subsequent to the issuance of the July 8, 1972 order and while the 1972 Convention was in progress, various newspapers reported *ex parte* interviews with the trial court judge, Daniel A. Covelli, with respect to the Chicago

challenge. His statements display the judge's bias against petitioners in this case. Judge Covelli was quoted as advising respondents to seek to have his order enforced through proceedings in the Florida state courts as follows:

> "If I were Daley's lawyers I would file contempt papers down in Dade County (Florida) because that state should honor and enforce the orders of any other state." (*Chicago Daily News*, July 11, 1972 at p. 6)

Judge Covelli was further quoted in reference to the contest comparing the situation to that of Nazi Germany:

> "I'll tell you this: If McGovern is elected, it's going to be another Nazi Germany. Remember when Hitler took over and all the young guys were behind him . . . and you know what he did to Germany." (*Chicago Daily News*, July 11, 1972 at p. 6)

Judge Covelli has conceded that he discussed the case with newspaper reporters outside the presence of the parties and he has not denied making the quoted statements. Transcript of July 20, 1972 at pp. 24-27.

Subsequent to the Convention, petitioners moved that Judge Covelli vacate his July 8 order and disqualify himself from any further proceedings in the case on the ground that his statements indicated a patent bias, preventing petitioners from obtaining a fair hearing and a fair trial. Judge Covelli denied the motion and has continued to act in the case, issuing the supplemental order of August 2, 1972 and instituting criminal contempt proceedings against petitioners for alleged violation of the order of July 8, 1972.

The Decision of the Illinois Appellate Court

On September 12, 1973, the Illinois Appellate Court (First District) upheld the July 8 and August 2 orders of the Circuit Court of Cook County. In rejecting petitioners' contentions, the Appellate Court asserted that "the law of the state is supreme and party rules to the contrary are of no effect" (at pp. B-24-B-25) and held that:

> "The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois election code." (at p. B-21)

The Appellate Court further stated:

> "Once the delegates were chosen in a free, open and non-discriminatory primary election, it became the legal duty of the party to carry out the mandate of the electorate. *Once elected, any question of the delegates' qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts.*" (at p. B-26) [emphasis added]

The Appellate Court concluded:

> "We think the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats in the Convention and most certainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate. Such action is an absolute destruction of the democratic process of this nation and cannot be tolerated." (at pp. B-31-B-32)

As noted earlier, on November 29, 1973, the Supreme Court of Illinois denied petitioners' motion for leave to appeal the decision of the Illinois Appellate Court. Respondents, in opposing petitioners' motion for review of

the Appellate Court decision by the Illinois Supreme Court, stated:

> "If there is to be further review, let petitioners seek it from the Supreme Court of the United States. It is upon that Court that petitioners seem to rely anyway. It is not consonant with the best interests of the administration of justice that this Court now be asked to decide what the Supreme Court of the United States has said. If the Appellate Court has made an erroneous determination, the Supreme Court of the United States is the best place for petitioners to go to seek further relief." (Answer to Petition For Leave to Appeal in Illinois Supreme Court, November, 1973, at p. 5)

REASONS FOR GRANTING THE WRIT

I.

THE JUDGMENT BELOW IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN KEANE V. NATIONAL DEMOCRATIC PARTY AND INVOLVES FEDERAL CONSTITUTIONAL ISSUES OF FUNDAMENTAL IMPORTANCE TO THE FUNCTIONING OF THE POLITICAL PROCESS IN THE UNITED STATES.

The judgment below upholding the injunctive orders of the Circuit Court of Cook County on the ground that the 1972 Democratic National Convention "was without power or authority" to deny respondents seats in the Convention, and that power to bar the seating of petitioners in the Convention was in fact vested in the Circuit Court of Cook County, represents an assertion of judicial power and state law over the processes of national political parties and their presidential nominating conventions which, if valid, is of enormous significance for the functioning of the American political system.

The fact that the 1972 Democratic National Convention is long over has not made the case moot, deprived the judgment below of continuing effect or lessened the national significance of questions presented. The validity of the judgment below is, of course, of critical continuing importance to petitioners since, unless the judgment is reversed, the Circuit Court of Cook County will go forward with its actions to punish petitioners for participation in the 1972 Democratic National Convention. The effort, expense and injury to reputation involved in the Cook County contempt proceedings to date has already constituted a substantial penalty upon petitioners' exercise of their rights to participate in the political process

in accordance, petitioners submit, with the express decision of this Court that the 1972 Democratic National Convention had the right to decide the Chicago contest. Further, unless the judgment below is reversed, petitioners will continue to be barred by the Circuit Court's supplemental order of August 2, 1972 from exercising their right as seated delegates to participate in the selection of Democratic National Committee members from Illinois to serve until the 1976 National Convention.

Moreover, as this Court emphasized in *Keane* v. *National Democratic Party,* the "novel questions of importance" raised by this litigation are of vital significance not only to the immediate litigants but "to the political system under which national political parties nominate candidates for office and vote on their policies and programs." (at p. A-2) Contests over the seating of delegates have been a recurring feature of national presidential nominating conventions. As this Court stated, "it has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4) If the contrary decision of the Illinois Appellate Court is correct—that the question of whether to seat respondents was "beyond the authority of party functionaries" (at p. B-26) and that respondents had "a legal right [to be seated] properly protected by the courts" (at p. B-26)—then that decision represents a major limitation on what have historically been viewed as the Constitutional rights of free political association of a national political party and its members. That decision has immediate and direct consequences for the activities of the national political parties as they promulgate rules and standards to govern delegate selection at future national conventions. The decision of the Illinois Appellate

Court that "the law of the state is supreme and party rules to the contrary are of no effect" (at pp. B-24-B-25) means that any power in the national party to enforce and apply its own rules and standards is substantially eliminated. The effect of the Appellate Court decision, if valid, is that resort in virtually all contests at future national conventions will be to the state courts, denying to the national party conventions the historical right (specifically upheld by this Court in *Keane* v. *National Democratic Party*) under which "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-5)

A. THE JUDGMENT BELOW IS DIRECTLY CONTRARY TO THE DECISION OF THIS COURT IN KEANE V. NATIONAL DEMOCRATIC PARTY WHICH ESTABLISHED THE RIGHT OF THE 1972 DEMOCRATIC NATIONAL CONVENTION TO DECIDE THE CHICAGO CREDENTIALS CONTEST.

The July 7, 1972 decision of this Court established the right of the 1972 Democratic National Convention—and not the courts—to decide both the Chicago and California credentials contests. This Court's *per curiam* opinion, citing "the large public interest in allowing the political processes to function free from judicial supervision," (at p. A-5) was explicit and unambiguous in this regard. Having chosen to seek to reverse the Credentials Committee's decision on the Chicago contest by legal action in the Federal courts in Washington, D.C., and having lost in the District Court, the Court of Appeals and finally, at a rare special session, in the Supreme Court of the United States, respondents clearly were not entitled to proceed to relitigate the issues in the case in an Illinois state court in an effort to obtain a different result. Under the supremacy clause of the United States Constitution, once this Court

decided the issue, the Circuit Court of Cook County had no power to issue an injunctive order contrary to this Court's decision.

The opinion of the Illinois Appellate Court upholding the Circuit Court of Cook County offers no basis for the Circuit Court's actions in the face of this Court's July 7 decision. Indeed, the sole discussion in the Illinois Appellate Court opinion of the explicit language of this Court's *per curiam* decision of July 7 consists of the following:

> "[T]he defendants contend the judgment of the Supreme Court staying the injunction of the Court of Appeals was intended solely to permit a determination of the issues to be made by the Democratic National Convention 'free from judicial intervention.' (*Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563, judgment stayed, ... U.S. ....., 34 L. Ed. 2d 1.) The opinion does not say 'free from judicial intervention,' but says 'absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee."[*] The court was discussing the Federal Courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State courts over their delegates. It must be recognized that the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the Illinois delegates and challengers under the Illinois Election Code." (at pp. B-12-B-13)

The Illinois Appellate Court's attempt to distinguish this Court's decision is invalid on its face. The Appellate Court states that "the Circuit Court of Illinois was not intervening in the Convention, but only exercised its juris-

* The Appellate Court's characterization of this Court's opinion wholly ignores, among other things, this Court's express reference to permitting the political processes to function "free from judicial supervision." (at p. A-5)

diction over the Illinois delegates and challengers under the Illinois Election Code." (at p. B-13) This is a distinction without a difference. The Illinois injunction against participation by petitioners in the National Convention was plainly "intervening in the Convention". Indeed that was its only and express purpose. If the purpose of the state court injunction had been effected, the 1972 Democratic National Convention would have been forced to seat respondents (or possibly to seat no delegates from Chicago). In view of the closeness of the Convention votes, it is entirely conceivable that the injunction could have affected the outcome of the Convention.* Moreover, the Circuit Court of Cook County has subsequently proceeded with contempt actions to punish petitioners for participation in the Convention. Such actions directly contravene the right of the Convention "to accept or reject, or accept with modification, the proposals of its Credentials Committee" which this Court upheld in its July 7 decision.

The decision of the Illinois Appellate Court that "the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats" (at p. B-31) is directly contrary to this Court's decision

* If the Illinois court were correct, a California state court could similarly, on the eve of the 1972 Democratic National Convention, have dictated the outcome of the California credentials contest and the state courts of the 49 other states would have comparable jurisdiction, with the effect that the outcome of the national presidential nominating conventions of both political parties would frequently be determined by state court decisions. Prior to the 1952 Republican National Convention, for example, a state trial court in Georgia issued a last-minute decision regarding which of the two competing Georgia delegations was entitled to be seated at that Convention which, if the 1952 Republican Convention had been bound to follow it, might well have affected the Convention's outcome. See 1952 Republican National Convention Proceedings at pages 164-195.

that the 1972 National Convention could deny seats to the elected delegates from both California and Illinois in accordance with the historical understanding "since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4)

There is also no basis for the suggestion of the Illinois Appellate Court that this Court's decision of July 7 was not concerned with "state laws, election of delegates or their rights" and that this Court's decision operated only to free the processes of the national party from Federal and not state court intervention. (at p. B-12) In both the Chicago and California cases, this Court was directly concerned with delegates elected in accordance with state law and this Court clearly upheld the right of the 1972 National Convention, in the circumstances of the two cases, to refuse to seat such delegates. While some of the specific references in this Court's opinion of July 7 are to Federal courts, all of the principal grounds stated by this Court in its opinion apply by their terms to the prospect of state as well as Federal court action.

"[T]he large public interest in allowing the political processes to function free from judicial supervision," to which the July 7 opinion of this Court refers (at p. A-5), is as applicable to the Circuit Court of Cook County as it is to the Supreme Court of the United States. The same is true of the emphasis throughout this Court's opinion on the historical freedom under which "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-4) The "vital rights of association guaranteed by the Constitution" to which this Court refers (at p. A-5) are equally threatened by state court action. Even more applicable to the actions

of the Illinois court—since it acted on the night following this Court's decision—was this Court's emphasis upon the inadequate time available for judicial consideration of the issues on the merits, which consequently warranted judicial abstention and permitting the political process to go forward freely under the circumstances (at p. A-3).

Even if one were to ignore the explicit language of this Court's opinion of July 7, under unambiguous Federal law established by prior decisions of this Court, this Court's action in staying (but not at that time vacating) the July 5 judgment of the Court of Appeals did not alter the binding and res judicata effect of that judgment (which, as noted earlier, was explicitly adverse to respondents' state court claim) or permit collateral attack in the Illinois courts. "The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel . . . *this is true even if the appeal is taken with a stay or supersedeas; these suspend execution of the judgment but not its conclusiveness in other proceedings.*" 1B Moore's Federal Practice ¶ 0.416[3] at 2252-53 [emphasis added]. See, *e.g., Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941). Nothing in the *per curiam* opinion of this Court staying the judgments of the Court of Appeals suggested any intention to permit relitigation of the issues in an Illinois court. On the contrary, this Court's opinion expressly stated that its action was intended to permit the National Convention to exercise its historical right to resolve controversies over the seating of National Convention delegates. It was during the period that the stayed judgment of the Court of Appeals was outstanding and unvacated that the Circuit Court of Cook County entered its orders purporting to bar conduct which the Court of Appeals had expressly authorized. The actions of the 1972 National Convention and of petitioners

during this period were taken under the explicit protective umbrella of that judgment, as well as the opinion of this Court.*

In proceedings before the Court of Appeals for the District of Columbia on remand from this Court, counsel for the National Democratic Party, which was also a party to

* This Court vacated and remanded the judgment of the Court of Appeals on October 10, 1972 only *after* the 1972 Democratic National Convention and *after* the orders which petitioners herein are seeking to have reversed were entered. The Illinois Appellate Court ignored the established law that this Court's stay order left the Court of Appeals' judgment outstanding and therefore res judicata during the time of the National Convention and the various actions of the Circuit Court of Cook County. The Appellate Court held, citing no authority, that the effect of this Court's stay and subsequent vacating of the Court of Appeals' decision was to render "said order non-existent and a nullity, as if it never existed." (at B-13)

As a further reason why the judgment of the Court of Appeals (which had been stayed but not vacated) was not entitled to res judicata effect in the Circuit Court of Cook County, the Illinois Appellate Court stated that it "finds a near total lack of identity as to either issues or parties." (at p. B-14) In fact, however, the Court of Appeals (which went so far as to enjoin the state court proceedings) expressly noted in its decision that "all interested parties [were] represented in the Federal forum" (at p. D-23) (plaintiffs in the two actions were the same and the ten original challengers were defendants in both actions) and that it had adjudicated the issues involved in the state court action. (at pp. D-17, D-20-D-21)

The Illinois Appellate Court also stated that petitioners failed "to preserve their argument, based on the res judicata effect of the decision of the United States Court of Appeals for the District of Columbia in the record." (at p. B-15) In fact, however, the record clearly shows that the July 5 judgment of the Court of Appeals, as well as the July 7 decision of this Court, were both presented to the trial court judge; and both opinions appear as exhibits in the record of the trial court proceeding. (Report of Proceedings of July 8, 1972 at pp. 29-30 and related exhibits).

the Federal proceedings, described the injunctive order issued by the Circuit Court of Cook County purporting to bar petitioners from participating in the 1972 National Convention as "transparently invalid" in light of this Court's prior decision.* The Court of Appeals for the District of Columbia, fully advised as to all of the proceedings in this case, explicitly held on February 16, 1973 that, under the July 7 decision of this Court, the 1972 National Convention "acting within its competence" seated petitioners in the National Convention, and the Court of Appeals reaffirmed the dismissal of respondents' complaint against the seating of petitioners. (at pp. E-2-E-3)** The Court of Appeals denied petitioners' request for an injunction against the Illinois proceedings not because of any disagreement on the merits (on which it expressly upheld petitioners' position) but because of reluctance in the absence of "extraordinary circumstances" to enjoin a pending case in a state court.

This Court's decision of July 7, 1972 was issued at a time of great urgency. The decision was issued on Friday

* Counsel for the National Democratic Party also stated:
"At every stage of this litigation, the National Democratic Party has taken the position that under the Constitution no courts—state or federal—may interfere in the internal affairs of a national political party, except possibly in exceptional circumstances not present in this case. That position was adopted, on at least a preliminary basis, by the Supreme Court in its ruling in this case." Response of Joseph A. Califano, Jr., et al., Counsel for National Democratic Party and Democratic National Committee in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. November 27, 1972 at p. 1).

** See also *Republican State Central Committee of Arizona* v. *The Ripon Society Inc.*, 409 U.S. 1222 (1972) (opinion of Mr. Justice Rehnquist on application for stay) (citing *O'Brien* v. *Brown* in granting a stay of a lower court injunction which would have limited in some respects the freedom of the 1972 Republican National Convention).

evening; the Democratic National Convention was to convene the following Monday. This Court, sitting in a rare special session, determined to allow the political process to go forward freely, stating that "absent judicial intervention, the Convention could decide to accept or reject, or accept with modifications, the proposals of its Credentials Committee" and noting that its decision "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee." (at p. A-5) There is not one word in this Court's opinion which supports respondents' contention, upheld by the Illinois Appellate Court, that this Court somehow intended to allow relitigation of the issues in a state court with a result directly contrary to that which this Court had reached.

Petitioners submit that it was and remains clear that this Court intended to end this litigation, recognizing—at least in the circumstances of this case—that "the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4) The Illinois courts have refused to follow this Court's decision.

B. THE JUDGMENT BELOW INVOLVES FEDERAL CONSTITUTIONAL ISSUES OF FUNDAMENTAL IMPORTANCE TO THE FUNCTIONING OF THE POLITICAL PROCESS.

There is no precedent for the proposition of the Illinois Appellate Court that questions of the seating of national convention delegates are "beyond the authority of party functionaries" and that a national political party convention is "without power or authority" to refuse to seat delegates chosen in accordance with state law. The Appellate Court's decision is directly contrary to the February 16, 1973 decision of the Court of Appeals for the District of Columbia Circuit that "the 1972 Convention of

the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs Keane et al. [respondents]." (at p. E-2) As Judge Hubert Will's memorandum opinion states, if the claim that state courts have jurisdiction over such controversies were accepted, "each of the 50 states could establish the qualifications of its delegates to various party conventions without regard to party policy, an obviously intolerable result." (at p. F-6) Similarly, there is no precedent for a court injunction such as the supplemental injunction issued by the Circuit Court of Cook County on August 2, 1972 against persons participating in the continuing processes of a national political party.

This Court accurately stated in its opinion in *Keane* v. *National Democratic Party* that "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (at p. A-5) The authorities cited by the Illinois Appellate Court in support of its decision that respondents had "a legal right [to be seated] properly protected by the courts" do not, in fact, support judicial intervention into the process of a national political party convention.* The Illinois Appellate Court purports

* For example, *State ex rel. Cook* v. *Houser*, 122 Wis. 534, 100 N.W. 964 (1904), cited at length by the Illinois Appellate Court (at pp. B-23-B-24), expressly stated:

> "[W]hether the National Republican Convention decided right or wrong, for itself, in determining which of the sets of delegates applying for seats in such Convention as the regular Republican delegates from this state, were entitled to be recognized as such, *we [the court] have nothing whatever to do.*" 100 N.W. at p. 983.

None of the other cases cited by the Appellate Court even concerns the relationship of state laws to a National Party Convention. The other cases all involve regulation by state law and state courts of internal state political party affairs.

to find authority for its actions in various past decisions of this Court. (at pp. B-26-B-31) Yet this Court itself expressly and accurately stated in *Keane* v. *National Democratic Party* that "no holding of this Court up to now gives support for judicial intervention in the circumstances presented here involving as they do relationships of great delicacy and essentially political nature." (at p. A-4)

There are repeated instances in which the national party conventions of both political parties have refused to seat delegates chosen in accordance with state law (whether by committee, convention or primary election) and have seated delegates chosen by alternative processes. See generally Leventhal, "The Law of National Party Conventions," *The New York Law Journal* (Aug. 25, 1964); R. Bain, *Convention Decisions and Voting Records* (Brookings 1960). In 1968 alone, the Democratic National Convention in Chicago refused to seat the entire delegation chosen in accordance with Mississippi law and seated instead delegates chosen by an alternative caucus procedure conducted by the challengers; the Convention deprived the delegates chosen in accordance with Georgia law of one-half their seats and gave the seats to delegates chosen at a convention conducted by the challengers; and the Convention refused to seat delegates elected in accordance with Alabama law (unless they were willing to take a "loyalty oath") and, to replace them, seated members of a challenging slate chosen by an ad hoc process. See Schmidt and Whalen, *Credentials Contests at the 1968 - and 1972 - Democratic National Conventions*, 82 *Harvard Law Review* 1438 (1969).

The Rules of the National Republican Party expressly impose an obligation upon all party members to comply

with National Party Rules regardless of state laws (see Report of the Committee of Rules and Order of Business, 1968 Republican National Convention Proceedings at 10-14) and the Republican Convention has acted to enforce this obligation. See, *e.g.*, 1912 Republican National Convention Proceedings at pp. 202-12. Prior to the 1952 Republican National Convention, a state trial court in Georgia had issued a last-minute decision regarding which of two contesting Georgia delegations was entitled to be recognized, but the Republican National Convention rejected that decision and seated the contesting delegation on the basis that "this National Convention is absolutely the last authority, the supreme court in deciding who shall have credentials to this Convention, and it shall not be dictated to by the state court of Georgia or by any other court." (Remarks of Delegate Gordon X. Richmond of California, 1952 Republican National Convention Proceedings at p. 168).*

* Governor Alfred E. Driscoll of New Jersey stated in that debate:

> "This Convention is the sole judge of the qualifications of its own members . . . [T]he decision of a lower court in Georgia is not binding upon Republican tribunals nor can its decision be dispositive of the issues before this great Convention.
>
> "I have a healthy respect for the American judicial system. I have also a healthy respect for the judicial system of Georgia. But I submit to you that this is the supreme court of Republicanism and is the proper tribunal before which the issues raised by the contest must be settled.
>
> "[W]e have no right to allow our jurisdiction to be limited, for to do so would be to tie our hands and perhaps permit all kinds of judicial decisions to prevent us carrying on our business.
>
> "We and we alone are the sole judges of the qualifications of our members." 1952 Republican National Convention Proceedings at p. 169

If the Illinois Appellate Court is correct that "the law of the state is supreme and party rules to the contrary are of no effect," (at pp. B-24-B-25) then it is difficult to exaggerate the significance of that holding for the functioning of our political system. "Vital rights of association guaranteed by the Constitution" to which this Court referred in *Keane* v. *National Democratic Party* (at p. A-5) would be subject to a radical limitation. In the Chicago case in 1972, for example, counsel for the National Democratic Party emphasized that it would have been "a violation of the First Amendment rights of all Democrats to permit Illinois to foist on the party's national convention—its highest governing body—a delegation selected in gross violation of some of the most fundamental principles of the party." Memorandum of National Democratic Party in Opposition to Petition for Certiorari (July 6, 1972, at p. 14) The processes in which both National Political Parties continually engage of drafting and promulgating rules and principles to govern their National Conventions would be, to a very substantial degree, moot and irrelevant, and credentials contests at future National Conventions would be decided not by internal party processes but by the courts.

This Court stated in *Keane* v. *National Democratic Party* that the petitions for certiorari presented "novel questions of importance to the immediate litigants and to the political system under which national political parties nominate candidates for office and vote on their policies and programs." (Appendix A at p. A-2) These important questions continue to be involved in this litigation and certiorari should therefore be granted by this Court either to reverse summarily the judgment below on the basis of *Keane* v. *National Democratic Party* or to review the fundamental Constitutional issues involved in this case.

II.

THE JUDGMENT BELOW REFUSING TO REVERSE THE ORDERS APPEALED FROM BECAUSE THE TRIAL JUDGE HAD SHOWN BIAS AGAINST PETITIONERS IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The trial judge below publicly advised respondents to enforce his injunctive orders in a Florida state court and compared the situation to Nazi Germany. The comments are quoted at pages 15 to 16, *supra*.

The Illinois Appellate Court below, basing its decision upon (1) a party's right to only one change of venue under the Illinois Venue Act and (2) the fact that the trial judge made his statements only after issuing his original order, refused to vacate the trial court's orders on this ground. (at pp. B-33-B-34) However, the relief sought was not grounded upon any statutory right to a change of venue but upon the constitutional guarantee of a trial before "an unbiased judge." This right is essential to due process. *Holt* v. *Virginia*, 381 U.S. 131, 136 (1964). *Cf. Irvin* v. *Down*, 366 U.S. 717, 722 (1961); *Tumey* v. *Ohio*, 273 U.S. 510, 522 (1926). It is axiomatic that "trial before 'an unbiased judge' is essential to due process." *Johnson* v. *Mississippi*, 403 U.S. 212, 216 (1971). The fact that the trial judge's statements were made after his original order was issued does not alter the demonstration of bias they represent. Further, the statements were made prior to the trial judge's supplemental order of August 2, 1972.

This Court's previous decisions have held that petitioners had a right to a hearing before an impartial judge, which they did not receive. Certiorari should be granted, if for no other reason, so that this Court may review the decision below on this fundamental Constitutional issue.

CONCLUSION

Petitioners pray that this Court issue its writ of certiorari to the Illinois Appellate Court and summarily reverse the judgment of the court below on the authority of *Keane* v. *National Democratic Party* or, in the alternative, review the substantial Federal questions raised therein.

Respectfully submitted,

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No. 73-1106

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

APPENDICES

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In the
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OCTOBER TERM, 1973

No.

WILLIAM COUSINS, ET AL.,
Petitioners,

vs.

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Respondents.

APPENDICES

APPENDIX A.

Lawrence O'BRIEN et al., Petitioners,

v.

Willie BROWN et al.
Thomas E. KEANE et al., Petitioners,

v.

NATIONAL DEMOCRATIC PARTY et al.

Application Nos. A-23 and A-24
(In re Case Nos. 72-34 and 72-35)
[At July 7 Special Term, 1972].
Decided July 7, 1972.

PER CURIAM.

Yesterday, July 6, 1972, the petitioners filed petitions for writs of certiorari to review judgments of the United States Court of Appeals for the District of Columbia Circuit in actions challenging the recommendations of the Credentials Committee of the 1972 Democratic National Convention regarding the seating of certain delegates to the convention that will meet three days hence.

In No. 72-35, the Credentials Committee recommended unseating 59 uncommitted delegates from Illinois on the

ground, among others, that they had been elected in violation of the "slatemaking" guideline adopted by the Democratic party in 1971. A complaint challenging the Credentials Committee action was dismissed by the District Court. The Court of Appeals on review rejected the contentions of the unseated delegates that the action of the Committee violated their rights under the Constitution of the United States.

In No. 72-34, the Credentials Committee recommended unseating 151 of 271 delegates from California committed by California law to Senator George McGovern under that State's "winner-take-all" primary system. The Committee concluded that the winner-take-all system violated the mandate of the 1968 Democratic National Convention calling for reform in the party delegate selection process, even though such primaries had not been explicitly prohibited by the rules adopted by the party in 1971 to implement that mandate. A complaint challenging the Credentials Committee action was dismissed by the District Court. On review the Court of Appeals concluded that the action of the Credentials Committee in this case violated the Constitution of the United States.

Accompanying the petitions for certiorari were applications to stay the judgments of the Court of Appeals pending disposition of the petitions.

The petitions for certiorari present novel questions of importance to the immediate litigants and to the political system under which national political parties nominate candidates for office and vote on their policies and programs. The particular actions of the Credentials Committee on which the Court of Appeals has ruled are recommenda-

tions that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee.

This Court is now asked to review these novel and important questions and to resolve them within the remaining days prior to the opening sessions of the convention now scheduled to be convened Monday, July 10, 1972.

The Court concludes it cannot in this limited time give to these issues the consideration warranted for final decision on the merits; we therefore take no action on the petitions for certiorari at this time.

The applications to stay the judgments of the Court of Appeals call for a weighing of three basic factors: (a) whether irreparable injury may occur absent a stay; (b) the probability that the Court of Appeals was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the judgments of the Court of Appeals.

Absent a stay, the mandate of the Court of Appeals denies to the Democratic National Convention its traditional power to pass on the credentials of the California delegates in question. The grant of a stay, on the other hand, will not foreclose the Convention's giving the respective litigants in both cases the relief they sought in federal courts.

We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the

internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates.[1] No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy and essentially political in nature. Cf. Luther v. Borden, 7 How. 1, 12 L.Ed. 581 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (CA8 1968), affirming, 287 F.Supp. 794 (D.C. Minn. 1968), and cases cited; Lynch v. Torquato, 343 F.2d 370 (CA3 1965); Smith v. State Exec. Comm. of Dem. Party of Ga., 288 F.Supp. 371 (N.D.Ga. 1968). Cf. Ray v. Blair, 343 U.S. 214, 72 S.Ct. 654, 96 L.Ed. 894 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this

[1] This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single State. Cf. Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed 1152 (1953); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed.

We recognize that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions. If this system is to be altered by federal courts in the exercise of their extraordinary equity powers, it should not be done under the circumstances and time pressures surrounding the actions brought in the District Court, and the expedited review in the Court of Appeals and in this Court.[2]

[2] Argument was had and the case decided in the District Court on July 3, the Court of Appeals entered its judgment July 5. Papers were filed here July 6.

The applications for stays of the judgments of the Court of Appeals are granted.

Applications Granted.

Mr. Justice BRENNAN is of the view that in the limited time available the Court cannot give these difficult and important questions consideration adequate to their proper resolution. He therefore concurs in the grant of the stays pending action by the Court on the petitions for certiorari.

Mr. Justice WHITE would deny the applications for stays.

Mr. Justice DOUGLAS, dissenting.

I would deny the stays and deny the petitions for certiorari. The grant of the stays is, in all respects, an abuse of the power to grant one. A stay presupposes an ultimate decision on the merits. But the petitions for certiorari will not be voted on until October, at which time everyone knows the cases will be moot. So the action granting the stays is an oblique and covert way of deciding the merits. If the merits are to be decided, the cases should be put down for argument. As Mr. Justice MARSHALL has shown, the questions are by no means frivolous. The lateness of the hour before the Convention and the apparently appropriate action by the Court of Appeals on the issues combine to make a denial of the stay and a denial of the petitions the only responsible action we should take without oral argument.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS joins, dissenting.

These two separate actions challenge the exclusion from the Democratic national convention by the party's credentials committee of 151 delegates from the State of California and 59 delegates from the State of Illinois, all of whom were selected as delegates as a result of primary elections in their respective States. The excluded delegates allege, in essence, that the refusal of the party to accept them as delegates denies them due process, and denies the voters who elected them their right to full participation in the electoral process as guaranteed by the United States Constitution.[1]

Two assertions are central to the challenge made by the delegates from California. First, they contend that under California's winner-take-all primary election law, which the Democratic party explicitly approved prior to the 1972 primary election,[2] and which the California voters relied on in casting their ballots, they are validly elected delegates committed to the presidential candidacy of Senator George McGovern. Second, they claim that after all of the presidential candidates who were on the ballot in California had planned and carried out their campaigns relying on the validity of the State's election laws, and after all votes had been cast in the expectation that the winner of the primary would command the entire California delegation, the credentials committee changed the party's rules and

[1] While the delegates couch their arguments in various ways, all of the arguments boil down to these two: *i.e.*, they have been denied due process and the voters who elected them have been denied an opportunity to vote for the candidate or delegate of their choice.

[2] This approval was given in the form of a written communication from the Commission on Party Structure and Delegate Selection to the Democratic National Committeeman from California.

reneged on the party's earlier approval of the California electoral system. The delegates contend that, in so doing, the committee and the party impaired the rights of both voters and duly elected delegates in violation of the Fourteenth Amendment.[3]

The Illinois delegates contend that they were excluded on the ground that they were "selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago and specifically and clearly identifiable as the party apparatus in [certain districts], to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate."[4] They argue that the restrictions placed by the rules on party officials violate their rights under the First and Fourteenth Amendments. It is also suggested that another reason why the delegates were excluded was that their delegation had an insufficient number of Negroes, women, and representatives of certain other identifiable classes of persons. This is alleged to be establishment of a "quota" system in violation of the Fourteenth Amendment.[5]

The United States District Court for the District of Columbia denied both sets of plaintiffs relief on the ground

[3] A hearing officer found merit in the delegates' claims, but he was reversed by the credentials committee.

[4] Report of Hearing Officer, at 2, adopted by Credentials Committee, June 30, 1972.

[5] Report of Hearing Officer, at 3-4.

that there was no justiciable question before it.[6] The United States Court of Appeals reversed the District Court and held that the questions presented in both suits were justiciable. It unanimously rejected the challenge made by the Illinois delegates, and by a 2-1 vote upheld the claim of the delegates from California that the belated change in the rules constituted a denial of due process of law.

The losing parties in the Court of Appeals seek review, and today, this Court grants partial relief in the form of a stay of the judgment of the Court of Appeals. The Court holds, in effect, that even if the District Court was incorrect in ruling that the issues before it were "political questions" not properly justiciable in a court of law, the posture and timing of these cases require that federal courts defer to the Democratic national convention for resolution of the underlying disputes. I cannot agree.

In each of these cases, the claim is made that the Credentials Committee has impaired the right of Democratic voters to have their votes counted in a Presidential primary election. The related claim is also made that the Committee has deprived the delegates themselves of their right to participate in the convention, by methods which deny them due process of law. Both these claims are entitled to judicial resolution, and now is the most appropriate time for them to be heard.

[6] The District Court Judge indicated that, in his view, a quota system would raise serious constitutional questions. Two judges of the Court of Appeals found that the rules did not require any quotas. Judge MacKinnon disagreed, believed that the rules did establish a quota, and that they were, therefore, unconstitutional.

If these cases present justiciable controversies, then we are faced with a decision as to the most appropriate time to resolve them. There would appear to be three available choices: now; after the credentials committee's report is either accepted or rejected by the national convention; or after the convention is over.

There can be no doubt, in my view, that there is, at the present time, a live controversy between the excluded delegates and the Democratic National Committee. Nevertheless, because this controversy may vanish at the national convention, it is suggested that judicial intervention is premature at this point. This may be correct with respect to a decision on whether to grant injunctive relief, but not with respect to the appropriateness of a declaratory judgment.

Should this Court, or a lower federal court, be compelled to wait until the national convention makes a final decision on whether it will seat the delegates excluded by the credentials committee, it may never again be practicable to consider the important constitutional issues presented. Once the convention rules, we will be faced with the Hobson's choice between refusing to hear the federal questions at all, or hearing them and possibly stopping the Democratic convention in midstream. This would be a far more serious intrusion into the democratic process than any we are asked to make at this time.

If we wait even longer—until the national convention is over—and ultimately sustain the delegates' claims on the merits, we would have no choice but to declare the convention null and void and to require that it be repeated. The dispute in these cases concerns the right *to participate* in the machinery to elect the President of the United States. If participation is denied, there is no possible way for the underlying disputes to become moot. The drastic remedy that delay might require should be avoided at all costs.

It is, therefore, obvious to me that now is the time for us to act. It is significant in this regard that the delegates request declaratory, as well as injunctive, relief. A declaratory judgment is a milder remedy than an injunction, cf. Perez v. Ledesma, 401 U.S. 82, 111, 91 S.Ct. 674, 690, 27 L.Ed.2d 701 (Brennan, J., concurring in part and dissenting in part). It is a particularly appropriate remedy under these circumstances, because it can protect any constitutional rights that may be threatened at the same time that the premature issuance of an injunction is avoided. Hence, I believe that we should consider the prayer for declaratory relief and that we should do so now.

In granting the stay, then, the Court seems to rely at least in part on the view that the claims are not yet ripe for decision, a view which I cannot accept for the reasons stated above. In addition, the Court suggests that judicial relief will be inappropriate even after the full Convention has ruled on these claims. The point appears to be that, quite apart from the mere matter of timing, the case presents a "political question," or is otherwise nonjusticiable, because it concerns the internal decision-making of a political party. That argument misconceives the nature and the purpose of the doctrine. Half a century ago, Justice Holmes, writing for a unanimous Court, made it clear that a question is not "political" in the jurisdictional sense,

merely because it involves the operations of a political party:

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since Ashby v. White, 2 Ld.Raym. 938, 3 Ld.Raym. 320, and has been recognized by this Court. Wiley v. Sinkler, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 45 L.Ed. 84; Giles v. Harris, 189 U.S. 475, 485, 23 S.Ct. 639, 47 L.Ed. 909. See also Judicial Code, § 24(11), (12), (14); Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092 (Comp.St. § 991). If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result." Nixon v. Herndon, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927).

The doctrine of "political questions" was fashioned to deal with a very different problem, which has nothing to do with this case. As the Court said in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961), the basic characteristic of a political question is that its resolution would lead a court into conflict with one or more of the coordinate branches of government; courts do decline to decide political questions out of deference to the separation of powers. 369 U.S., at 217, 82 S.Ct., at 710; see Powell v. McCormack, 395 U.S. 486, 518-549, 89 S.Ct. 1944, 1962, 1979, 23 L.Ed.2d 491 (1969). Neither the executive nor the legislative branch of government purports to have

jurisdiction over the claims asserted in these cases. Apart from the judicial forum, only one other forum has been suggested—the full convention of the National Democratic Party—and that is most assuredly not a coordinate branch of government to which the federal courts owe deference within the meaning of the separation of powers or the political question doctrine.

Moreover, it cannot be said that "judicially manageable standards" are lacking for the determinations required by these cases, 369 U.S., at 217, 82 S.Ct., at 710. The Illinois challenge requires the court to determine whether certain rules adopted by the National Party for the selection of delegates violate the First and Fourteenth Amendment rights of Illinois voters and, if the rules are valid, whether they were correctly applied to the facts of the case. The California challenge requires the court to determine whether the votes of party members were counted in accordance with the rules announced prior to the election and, if not, whether a change in the rules after the election violates the constitutional rights of the voters or the candidates. Both these determinations are well within the range of questions regularly presented to courts for decision, and capable of judicial resolution.

A second threshold objection, however, has been raised as an obstacle to judicial determination of these claims. Even if the actions of a political party are not inherently nonjusticiable, it is suggested that the Constitution places few, if any, restrictions on the actions of a political party, and none of those restrictions are even arguably implicated by any of the allegations here. On this view. then, the

plaintiffs below failed to state a claim on which relief can be granted. I disagree.

1. First, I agree with the Court of Appeals that the action of the Party in these cases was governmental action, and therefore subject to the requirements of due process. The primary election was, by state law, the first step in a process designed to select a Democratic candidate for President; the State will include electors pledged to that candidate on the ballots in the general election. The State is intertwined in the process at every step, not only authorizing the primary but conducting it, and adopting its result for use in the general election. In these circumstances, the primary must be regarded as an integral part of the general election, see United States v. Classic, 313 U.S. 299, 61 S.Ct., 1031, 85 L.Ed. 1368 (1941), quoted at p. 2726, *infra*, and the rules that regulate the primary must be held to the standards of elementary due process.

It is suggested that California, at least, cannot be charged with responsibility for the rules that are challenged here, because California by law sought (albeit unsuccessfully) to prohibit the party from adopting those rules. That argument is somewhat disingenuous, however, unless it can seriously be contended that California will decline to recognize on its ballot in the general election the nominee of the Democratic convention. For so long as the State recognizes and adopts the fruits of the primary as it was actually conducted, then the State has made that primary an integral part of the election process, and infused the primary with state action, no matter how vociferously it may protest. A State cannot render the action of officials "private" and strip it of its character as state

action, merely by disapproving that action. Monroe v. Pape, 365 U.S. 167, 172—187, 81 S.Ct., 473, 476—484, 5 L.Ed.2d 492 (1961).

Thus, when the Party deprived the candidates of their status as delegates, it was obliged to do so in a manner consistent with the demands of due process. Because the Court does not reach the question, I likewise refrain from expressing my views on the merits of the due process challenge in either case. It is sufficient to say that beyond all doubt, these claimants are entitled to a judicial resolution of their claim.

2. Even if the action of the credentials committee did not deny the delegates due process, plaintiffs in these cases claim that it impaired the federally protected right of voters to vote, and to have their votes counted, in the presidential primary election.[7]

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[7] The alleged impairment of that right may be regarded as state action, as above, and hence subject to challenge under 42 U.S.C. § 1983. Alternatively, it may be regarded as the action of the Federal Government, on the theory that Congress has the ultimate authority over presidential elections, and has acquiesced in the administration of the primary election process by the national political parties; in that case it may be subject to challenge on the theory of an implied remedy for a federal deprivation of constitutional rights, see Bivens v. Six Unknown Named Agents etc., 403 U.S. 388, 91 S.Ct. 1999. 29 L.Ed.2d 619 (1971). Finally, it may be regarded as private action which interferes with a federally protected right; in that case the existence of a right of action may depend on the question whether the claims can be brought within the terms of 42 U.S.C. § 1985(3), which protects certain federal rights against certain kinds of private interference, see Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

It is of course well established that the Constitution protects the right to vote in federal or state elections without impairment on the basis of race or color, Const.Amend. XV, or on the basis of any other invidious classification, e. g., Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961); Dunn v. Blumstein, 404 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). With respect to federal elections, however, the right to vote enjoys a broader constitutional protection. In Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1971), Mr. Justice Black cited a long line of precedent for the proposition that Congress has ultimate supervisory power over all congressional elections, based on Art. I, § 4 of the Constitution. E. g., Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1880); Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). On the basis of these precedents, it is beyond dispute that the right to vote in congressional election is a federally secured right.

Mr. Justice Black went on to argue that presidential elections have the same constitutional status: "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." 400 U.S., at 124, 91 S.Ct., at 264. To support this conclusion, he relied on Art. II, § 1, and its judicial interpretation in Burroughs v. United States, 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484 (1933), and also on "the very concept of a supreme national government with national officers." 400 U.S., at 124 n. 7, 91 S.Ct., at 264. On the basis of Oregon v. Mitchell, then, in which Mr.

Justice Black's analysis was decisive, the right to vote in national elections, both congressional and presidential, is secured by the Federal Constitution.

Moreover, federal protection of the right to vote in federal elections extends not only to the general election, but to the primary election as well. In United States v. Classic, 313 U.S. 299, 308, 61 S.Ct. 1031, 1034, 85 L.Ed. 1368 (1940), this Court sustained an indictment charging a conspiracy "to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast." 313 U.S., at 308, 61 S.Ct., at 1034. It was critical to the decision to hold first that the Constitution protects the right to vote in federal congressional elections, and second that the right to vote in the general election includes the right to vote in the primary.

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right, protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." 313 U.S., at 318, 61 S.Ct., at 1039.

That reasoning has equal force in the case of a presidential election. Where the primary is by law made an integral part of the election machinery, then the right to vote at that primary is protected just as is the right to vote at the election. In the cases before this Court, it is claimed that the presidential primary is an integral part of the election machinery, and that the right to vote in the presidential primary has been impaired. That claim should be heard and decided on its merits, certainly not by the use of the stay mechanism in lieu of granting certiorari and plenary consideration.

It is unfortunate that cases like these must be decided quickly or not at all, but sometimes that cannot be avoided. Where there are no substantial facts in dispute, and where the allegation is made that a right as fundamental as the right to participate in the process leading to the election of the President of the United States is threatened, I believe that our duty lies in making decisions, not avoiding them.

I would therefore deny the Stay.

APPENDIX B.

58096

PAUL T. WIGODA, et al., Plaintiffs-Appellees,

v.

WILLIAM COUSINS, et al., Defendants-Appellants.

Appeal from Circuit Court, Cook County.
Honorable Daniel A. Covelli, Presiding

MR. JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from an order entered in the Circuit Court of Cook County on July 8, 1972, enjoining and restraining the defendants herein from participating as delegates representing certain Congressional Districts in the State of Illinois at the 1972 Democratic National Convention which was convened in Miami, Florida, on July 10, 1972. Defendants also appeal from another order entered in the Circuit Court of Cook County on August 2, 1972, enjoining and restraining them from participating in a caucus of the Illinois delegation to the Democratic National Convention in order to elect the Illinois representatives to the Democratic National Committee.

The issues presented for review are: (1) whether the trial judge's assertion of jurisdiction over this matter contradicted the judgment of the U. S. Court of Appeals for the District of Columbia Circuit and the opinion of

the U. S. Supreme Court, if they were binding and res judicata as to the issues in this case; (2) whether the trial court's action violated fundamental constitutional rights of free political association of the defendants and the National Democratic Party; (3) whether courts of equity have jurisdiction over political controversies; and (4) whether the trial judge's public comments in this action display a gross bias against the defendants.

Pursuant to those provisions of the Illinois Election Code dealing with the making of nominations by political parties (Ill. Rev. Stat., Ch. 46, § 7-1 et seq.), a primary election was held in the State of Illinois on March 21, 1972. At this primary election, delegates and alternate delegates to the National Nominating Convention of both the Democratic and Republican parties were elected from each of the 24 Congressional Districts in the State of Illinois.

The plaintiffs herein are a class of 59 individuals, including Blacks, Latin Americans, women and persons between 18 and 30 years of age, who were elected in the March 21, 1972, primary election as uncommitted delegates to the National Democratic Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts. Initially, it is worthy of mention that all the plaintiffs in this appeal were required by the Election Code to file on or before January 14, 1972, nominating petitions signed by at least one-half of one per cent of the qualified primary electors of the Democratic Party residing in their respective Districts, in order to have their names placed on the March 21, 1972, primary election ballot. No challenges to the plaintiffs' petitions were raised, and the primary election was held on March 21, 1972, resulting in the election of the plaintiffs by a majority of the qualified electors of the Democratic Party in their respective Congressional Districts. Thereafter, these results were canvassed, certified and reported in accordance with the respective provisions of the Election Code, culminating on April 18, 1972, in the proclamation of the Secretary of State that the plaintiffs herein were the elected delegates to the Democratic National Convention from their respective Congressional Districts.

The defendants herein were initially 10 individuals who filed a formal challenge of the credentials of the plaintiffs with the Acting Chairman of the Credentials Committee of the Democratic National Party on March 31, 1972. In their challenge the defendants allege the plaintiffs were not entitled to credentials for the Convention as they were in violation of certain guidelines which had been previously set forth in the Report of the Commission of Party Structure and Delegate Selection to the Democratic National Committee, which were thereafter incorporated into Article III, Part J, of the Call of the 1972 Democratic National Convention. Specifically, the defendants alleged in their challenge that the plaintiffs were first chosen as candidates and thereafter elected to be delegates and alternate delegates based on slate-making procedures which were neither open to the public nor had rules attached thereto to attract public participation. The defendants further alleged in their challenge that the plaintiffs were chosen to the exclusion of certain minorities, namely,

Blacks, Latin Americans, women, and persons between 18 and 30 years of age.

In view of the aforementioned challenge filed by the initial 10 defendants, the plaintiffs filed a lawsuit in the Circuit Court of Cook County on April 19, 1972, the first day following the Secretary of State's proclamation naming the plaintiffs as the duly elected delegates to the Democratic National Convention and also, by operation of law, the first day which the plaintiffs could so act in their elective office. In this lawsuit, the plaintiffs sought to enjoin and restrain the defendants who had filed the challenge with the Acting Chairman of the Credentials Committee of the Democratic National Party. A motion for a preliminary injunction was set for April 21, 1972, before Judge Donald J. O'Brien. The hearing on this motion, however, was not held on April 21, 1972, because the defendants filed a petition in the U. S. District Court for the Northern District of Illinois removing the cause to that court on April 20, 1972. There the cause was then assigned to Federal Judge Hubert Will. Thereafter, on April 24, 1972, the plaintiffs filed a motion with Judge Will to remand the cause to the Circuit Court of Cook County on the ground that the initial removal to the U. S. District Court was improper as there was no federal question involved. Judge Will took the motion to remand under advisement and on May 18, 1972, he issued an opinion finding no basis for federal jurisdiction. Judge Will, however, also entered a 10-day stay of his findings in order to enable the defendants to appeal therefrom. Subsequently the U. S. Court of Appeals for the 7th Circuit denied any further stays of Judge Will's finding and

on June 30, 1972, dismissed the defendants' appeal on the ground that there was no basis for allowing the defendants' initial removal from the Circuit Court of Cook County to the U. S. District Court for the Northern District of Illinois.

During the period between April 24, 1972, when the instant plaintiffs filed their motion to remand the original cause to the Circuit Court of Cook County, and May 18, 1972, when Judge Will entered his opinion finding no federal jurisdiction, the defendants herein commenced yet another action in the U. S. District Court for the Northern District of Illinois. In that suit the defendants herein sought to enjoin the plaintiffs herein from any further prosecution of this action in the Circuit Court of Cook County as being violative of their First Amendment rights. That cause was assigned to Federal Judge Frank McGarr, who granted the instant defendants herein a series of non-reviewable temporary restraining orders which prevented any further action in the Circuit Court of Cook County, although such further action was contrary to Judge Will's findings wherein the cause was remanded to the Circuit Court of Cook County because there was no federal question, and the Federal Court therefore lacked jurisdiction. Finally, on June 9, 1972, Judge McGarr held a trial. At the conclusion of the trial a preliminary injunction was issued barring the defendants, who are the plaintiffs in the Circuit Court of Cook County, from proceeding with this action in the Circuit Court. The injunction issued by Judge McGarr was promptly appealed to the U. S. Court of Appeals for the 7th Circuit, where a hearing was held on June 29, 1972. Following oral argument, the court,

acting from the bench, reversed the injunction granted by Judge McGarr and ordered that its mandate issue forthwith so as not to delay any action in the Circuit Court of Cook County. *Cousins* v. *Wigoda,* 463 F.2d 603.

In an attempt to stay this mandate from the U. S. Court of Appeals for the 7th Circuit, the instant defendants petitioned Justice William Rehnquist of the U. S. Supreme Court on July 1, 1972, for a stay order. Following the hearing, Mr. Justice Rehnquist denied the instant defendants' application for a stay, thus clearing the way for a continuation of this action in the Circuit Court of Cook County. At this point it is necessary to mention certain other situations which were transpiring during the course of the previously discussed litigation so as to cast full and proper perspective on the continuation of the instant litigation in the Circuit Court of Cook County from which this appeal arose. These other situations were the activities of the Credentials Committee of the Democratic National Party, and certain litigation which originated in the U. S. District Court for the District of Columbia.

As previously mentioned, on March 31, 1972, the original 10 defendants to this action filed a "Notice of Intent to Challenge" with the Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention. In this "Notice" they stated their intent to challenge the seating of the 59 uncommitted delegates who are the plaintiffs in this action. Thereafter, these original 10 defendants filed a "Statement of Grounds of Challenge Against the Proposed 'Uncommitted' Delegates to the 1972 Democratic National Convention from the Districts Encompassing the City of Chicago." On May 26, 1972,

almost two months after the "Statement" was filed, Cecil F. Poole, a San Francisco attorney, was appointed as hearing officer by the Acting Chairman of the Credentials Committee to conduct hearings on the challenge previously filed by the instant defendants. These hearings were conducted in Chicago on May 31, June 1, and June 8, 1972, with the result being the submission of the document entitled "Findings and Reports of Cecil F. Poole, Hearing Officer to the Credentials Committee" on June 25, 1972. In his report Mr. Poole concluded the plaintiffs herein were elected in violation of certain guidelines set forth in the Call of the 1972 Democratic National Convention.

On June 30, 1972, the Credentials Committee of the 1972 Democratic National Convention, having before it the report of the hearing officer, voted to sustain the findings in the report. Moreover, the Credentials Committee recommended an "alternative" delegation chosen in private caucuses held in Chicago on June 22 and June 24, 1972, be seated to the exclusion of the duly elected delegates. The "alternative" delegation was comprised of the original 10 challengers, who were the original 10 defendants herein, and 49 other individuals, many of whom were defeated candidates for election as delegates in the March 21, 1972, primary. All 59 members of this "alternative" delegation were thereafter joined as defendants in the instant action.

Subsequently, on July 10, 1972, the question of whether to seat the duly elected Illinois delegates or to accept the recommendation of the Credentials Committee and seat the "alternative" delegation was presented to the 1972

Democratic National Convention for a vote. The Convention voted to accept the recommendation of the Credentials Committee and seat the "alternative" delegation to the exclusion of the duly elected Illinois delegation.

In mid-June, 1972, since the hearing officer appointed by the Acting Chairman of the Credentials Committee continually refused to consider questions of law concerning the legality of the Democratic Party Rules and Guidelines, a member of the plaintiff class, Thomas E. Keane, commenced a lawsuit against the Democratic National Party in the U. S. District Court for the District of Columbia to determine whether the guidelines upon which the plaintiff class had been challenged were constitutional. Although the original 10 defendants to the instant action were not made a party to this lawsuit, they sought to intervene and the District Court granted them leave to so intervene. Following a hearing, the District Court held three of the four guidelines upon which the challenge had been raised to be unconstitutional. On immediate appeal to the U. S. Court of Appeals for the District of Columbia, this determination by the District Court was held to be premature because no action had yet been taken by the Credentials Committee on the challenge.

As previously mentioned, the Credentials Committee did render a decision on June 30, 1972, to recommend exclusion of the plaintiff delegates. In light of this action by the Credentials Committee, the District Court for the District of Columbia on July 3, 1972, once again held a hearing and found three of the four guidelines upon which the challenge had been raised to be unconstitutional.

On July 4, 1972, an appeal was again taken to the U. S. Court of Appeals for the District of Columbia. The Court of Appeals on July 5, 1972, affirmed the District Court as to the constitutionality of the one guideline which had been found constitutional and issued an injunction to prevent the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County. The Court of Appeals did, however, stay its mandate for 24 hours to enable the plaintiffs to apply to the U. S. Supreme Court for a further stay. The plaintiffs applied for such a stay and also on July 6, 1972, filed a Petition for Writ of Certiorari. Following a Special Session, the U. S. Supreme Court on the evening of July 7, 1972, granted a stay of the judgment of the Court of Appeals which had enjoined the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County. The Supreme Court also took the Petition for Writ of Certiorari under advisement. *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563, judgment stayed ..... U.S. .....; 34 L. Ed.2d 1.

Thereafter, following the Convention, the Supreme Court granted the Petition for Writ of Certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals for the District of Columbia to determine whether the case was moot. *Keane* v. *The National Democratic Party,* judgment vacated ..... U.S. .....; 34 L. Ed.2d 73, October 10, 1972.

On February 16, 1973, the Court of Appeals for the District of Columbia held the case as remanded by the Supreme Court moot and affirmed the judgment of the District Court for the District of Columbia.

Since the U. S. Supreme Court had stayed the judgment of the Court of Appeals for the District of Columbia which had enjoined the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County on the evening of July 7, 1972, the plaintiffs served notice on the original 10 defendants as well as those who had been joined subsequent to their election as members of the "alternative" delegation that a hearing on the original complaint would be held before Judge O'Brien in the Circuit Court of Cook County on July 8, 1972. At the hearing on July 8, 1972, the defendants moved for a change of venue from Judge O'Brien, and the case thereafter was assigned to Judge Daniel A. Covelli. Following a hearing, Judge Covelli entered certain findings of fact from the evidence which had been presented to him. Based upon these findings, Judge Covelli ordered the 59 defendants (each of whom had formally been represented by counsel who was present for the hearing and each of whom had thereby submitted himself to the jurisdiction of the Circuit Court of Cook County) enjoined and restrained from acting or purporting to act as a delegate to the 1972 Democratic National Convention from the particular Congressional Districts involved, or from performing the functions of such delegates in the National Democratic Convention or in its committees.

Rather than seeking an appeal from this injunction, the record reflects the defendants on July 10, 1972, were seated as delegates to the 1972 Democratic National Convention representing the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts in the State of Illinois and thereafter participated as such.

Following the Convention the plaintiffs filed a motion for supplemental relief in the Circuit Court of Cook County. In this motion the plaintiffs sought to enjoin the defendants from participating in a party caucus of delegates to be held on August 5, 1972, for the purpose of selecting the Illinois representatives to the Democratic National Committee. On August 2, 1972, Judge Covelli held an evidentiary hearing in which all parties participated. At this hearing the procedure in which the defendants had been selected as the "alternative" delegation was introduced, as well as the fact that the defendants had violated the July 8, 1972, injunction by participating in the 1972 Democratic National Convention as delegates. Once again, following the hearing, Judge Covelli entered certain findings of fact in which he found the plaintiffs to be the only duly elected delegates. Thereafter the judge ordered a supplemental injunction be entered which reflected his findings of fact that the plaintiffs were the only persons entitled to participate as delegates in the August 5, 1972, party caucus of delegates, and he also restrained the defendants from performing any functions as delegates at such caucus. This appeal was thereafter taken from the orders of the trial court entered on July 8 and August 2, 1972.

The first issue presented for review is whether the trial court's assertion of jurisdiction over this matter contradicted the judgment of the U. S. Court of Appeals for the District of Columbia Circuit and the opinion of the U. S. Supreme Court, and whether they were binding and res judicata as to the issues in this case.

The defendants contend the trial court lacked jurisdiction to consider this cause. The basis for this contention by the defendants lies in their interpretation of the effect of the judgment by the U. S. Court of Appeals for the District of Columbia Circuit entered on July 5, 1972, wherein the Court of Appeals enjoined the plaintiffs from proceeding with this cause in the Circuit Court of Cook County. *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563. The defendants acknowledge such judgment was stayed by the U. S. Supreme Court on the evening of July 7, 1972. However, they attempt to limit the nature of the stay entered by the Supreme Court by asserting that nothing in the opinion of the Supreme Court suggests any intention whatsoever of permitting the plaintiffs to proceed with this cause in the Circuit Court of Cook County. Rather, the defendants contend the judgment of the Supreme Court staying the injunction of the Court of Appeals was intended solely to permit a determination of the issues to be made by the Democratic National Convention "free from judicial intervention." *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563, judgment stayed ..... U.S. ....., 34 L. Ed.2d 1. The opinion does not say "free from judicial intervention," but says "absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee." The court was discussing the Federal Courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State Courts over their delegates. It must be recognized that the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the

Illinois delegates and challengers under the Illinois Election Code.

The defendants further contend the Supreme Court's stay of the judgment of the Court of Appeals does not operate in any way to alter the binding and res judicata effect of that judgment, and thereby permit a collateral attack of that judgment in an Illinois court, specifically the Circuit Court of Cook County. The defendants would have this court accept their interpretation that the execution of the judgment of the Court of Appeals has been suspended by the Supreme Court's action, thereby barring any assertion of jurisdiction over this matter by an Illinois court.

At the outset, this court is requested to take judicial notice that the judgment of the U. S. Court of Appeals for the District of Columbia Circuit, upon which the defendants base their contention, was subsequently vacated by the U. S. Supreme Court and remanded to the Court of Appeals for further determination. *Keane* v. *The National Democratic Party,* 469 F.2d 563, judgment stayed ..... U.S. ....., 34 L. Ed.2d 1, judgment vacated U.S. ....., 34 L. Ed.2d 73. Considering first the stay order, we hold it completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed. Then came the Supreme Court order vacating the Court of Appeals order, thereby rendering said order non-existent and a nullity, as if it never existed. It was stricken from the records and of no force or effect. Certainly such a vacated order could not be res judicata of anything. In addition there are other reasons why it is not res judicata.

On February 16, 1973, the Court of Appeals determined the issues before it were moot and joined in the finding previously entered by the District Court for the District of Columbia, wherein the defendants were denied the injunctive relief which they sought. *Keane* v. *The National Democratic Party,* U.S.C.A. for the District of Columbia Circuit, Docket No. 72-1629 (1973).

For a court to apply the doctrine of res judicata or the broader doctrine of estoppel by judgment, there are certain prerequisites which must be present. To be res judicata there must not only be an identity of the parties involved but there must also, and most importantly, be an identity of the issues. For the doctrine of estoppel by judgment to lie there must minimally be an identity of issues.

Viewing the issues and parties involved herein as compared with the issues and parties in the case upon which the defendants rely, namely, *Keane* v. *The National Democratic Party,* we find a near total lack of identity as to either issues or parties. The issue which is central to the instant cause is the Illinois Election Code (Ill. Rev. Stat., 1971, Ch. 46, § 7-1, et seq.), and the right of the plaintiffs who were elected pursuant to its provisions to serve in their elective office. The issue which was central to the litigation which ensued in *Keane* v. *The National Democratic Party* was the constitutionality of the guidelines of the National Democratic Party, upon which the Credentials Committee for the 1972 Democratic National Convention had determined the plaintiffs herein were not in compliance. In fact, the trial court in *Keane* v. *The National Democratic Party* stated:

"No violation of Illinois law is at issue here."

Likewise, the parties in the two causes differ. The plaintiff in both causes is that same class composed of those individuals elected to be delegates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts in the State of Illinois. The defendants, however, are quite different. The defendants herein are the 59 members of the "alternative" delegation, including the original 10 individuals who initiated the challenge of the plaintiffs' right to sit as delegates filed with the Credentials Committee on March 31, 1972. The defendant in *Keane* v. *The Democratic National Party* was the National Democratic Party, although the original 10 challengers sought and were granted leave by the U. S. District Court for the District of Columbia to intervene in that case.

Another reason is most clear for this court to refuse to entertain the defendants' contention, namely, the defendants' failure to preserve their argument, based on the res judicata effect of the decision of the U. S. Court of Appeals for the District of Columbia Circuit, in the record. The Illinois Supreme Court in *Svalina* v. *Saravana,* (1930) 341 Ill. 236, stated that for an estoppel defense to act as a bar to further litigation, it must be both pleaded and proven. A thorough review of the record as related to both the July 8, 1972, and August 2, 1972, trial court proceedings reflects that the defendants neither formally pleaded nor attempted to prove their claim of res judicata based on the decision of the Court of Appeals for the District of Columbia Circuit. The record reflects the defendants entered no pleadings other than a motion to

dismiss, which was filed on July 5, 1972, and upon which they chose to stand. In that motion to dismiss, defendants refer to the litigation in the District Court for the District of Columbia. However, they make no mention of the decision of the Court of Appeals upon which they rely for their res judicata contention. This is another reason why this court refuses to entertain the defendants' contention concerning the res judicata claim of the decision of the Court of Appeals for the District of Columbia.

This court is also asked to take judicial notice of the decision of the Court of Appeals for the 7th Circuit in the case of *Cousins* v. *Wigoda,* (1972) 463 F.2d 603, initiated by the original 10 challengers, defendants herein, against that class of persons who are plaintiffs herein in the U. S. District Court for the Northern District of Illinois. In that decision the Court of Appeals for the 7th Circuit makes it most clear where they believe jurisdiction over the instant matter should be assumed when they state:

> "There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not . . . disputed those allegations. . . . Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues. . . . Plaintiffs have not alleged or attempted to prove they will not receive a fair trial in the courts of Illinois, or that the state judicial system will not fully honor and protect their constitutional rights."

Immediately thereafter the challengers sought a stay of the Court of Appeals order from the Supreme Court of

the United States. In denying the stay, Mr. Justice Rehnquist said (409 U.S. 1201, 34 L. Ed.2d 15):

> "The opinion issued by the Court of Appeals majority specifically alluded to petitioners' [the challengers'] failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to petitioners for this purpose."

The second issue presented for review is whether the trial court's action violated the fundamental constitutional rights of free political association of the defendants in the National Democratic Party.

The defendants contend their right to freedom of political activity and association as assured them under the First Amendment of the U. S. Constitution was patently abrogated by the trial court's judgment enjoining them from acting or purporting to act as delegates to the 1972 Democratic National Convention from the particular Congressional Districts involved herein. The defendants base this contention on their assertion: that the National Democratic Party formulated and adopted certain guidelines for organizing their Party; that the plaintiffs, following the filing of a challenge by 10 of the defendants and the holding of a formal hearing pursuant thereto, were found by the hearing officer to be in violation of certain of those guidelines; and, that the Credentials Committee of the 1972 Democratic National Convention adopted the findings of the hearing officer that the plaintiffs were in violation of certain of the guidelines and voted that the defendants should be seated as an "alternative" delegation in place of the plaintiffs. Based on these assertions, the defendants

conclude any attempt to prevent them from participating as delegates representing the challenged Congressional Districts would therefore violate their right, and the right of the National Democratic Party, to freedom of political activity and association as assured them under the First Amendment.

In claiming their fundamental rights have been abrogated, the defendants fail to consider certain rights of plaintiffs which have been abrogated not only by defendants' actions but also by the actions of certain representatives of the Credentials Committee of the 1972 Democratic National Convention. Initially, it is necessary for this court to state that although the purposes and guidelines for reform adopted by the Democratic National Party in its Call for the 1972 Democratic National Convention were issued, they in no way take precedence in the State of Illinois over the Illinois Election Code (Ill. Rev. Stat., 1971, Ch. 46, § 7-1, et seq.). The opening section of Article 7 of the Election Code, which deals with the making of nominations by political parties (§ 7-1), is most clear when in discussing the selection of delegates to National nominating conventions, it states:

> "§ 7-1. . . . [D]elegates and alternate delegates to National nominating conventions by all political parties, as defined in Section 7-2 of this Article 7, shall be made in the manner provided in this Article 7, and not otherwise."

The record reflects that at no time has the election of the plaintiffs been challenged by the defendants under any of the numerous provisions provided in Article 7 of the Election Code. These provisions were included in the

Election Code to insure the due process rights of the participants in elections and the rights of voters would be preserved at all stages of the elective process. On oral argument, counsel for the defendants admitted the plaintiffs were elected according to the provisions of the Election Code, and the defendants in no way contested such election under the Election Code. However, the defendants still persist in attempting to assert their right to the office of delegates to the 1972 Democratic National Convention from the particular Congressional Districts involved, and still contend that any judgment by the trial court in upholding the election of the plaintiffs by approximately 700,000 voters is an abrogation by that court of their fundamental rights of political association. We disagree with defendants' reasoning. On the one hand the defendants admit the plaintiffs were duly elected to the elective office of delegates to the 1972 Democratic National Convention, and on the other hand they state any judgment by the trial court upholding such election is a violation of their rights. The sole basis for such shallow reasoning appears to be the defendants' reliance on the findings of a hearing officer appointed by the Acting Chairman of the Credentials Committee for the 1972 Democratic National Convention to determine the merits of the defendants' challenge of the plaintiffs' election, and the action by the Credentials Committee in adopting his findings. Having reviewed the findings of the hearing officer, we conclude he erred in his refusal to consider the legal arguments, including the constitutionality of the guidelines, and by disregarding the Illinois law, all of which were raised by the plaintiffs. In view of the fact the defendants rely on a

report which is blatantly violative of the plaintiffs' due process rights on its very face, and the actions of the Credentials Committee subsequent to the receipt of such report, we find it necessary to examine the action of the Convention.

In *United States* v. *Classic,* 313 U.S. 299, at 318, 61 S.Ct. 1031, at 1039, the Supreme Court said:

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative."

The Poole report ignored the State law and the fact the guidelines referred to, which state "When State law controls, the Commission recommends that State Parties make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose," and also provides, "* * * the Commission urges each State Party to adopt procedures which will provide fair representation of minority views on presidential candidates and recommends that the 1972 Convention adopt a rule requiring State Parties to provide for the representation of minority views to the highest level of the nominating process."

The people voting in the primary elected 59 delegates, including nine male and three female Blacks, and four

Caucasian females, two Latin American females, and five Caucasian persons under 30 years of age, making a total of 23 delegates representing the minority views, yet the Poole report calls this "proof of actual discrimination by itself." Such a conclusion demonstrates deliberate distortion of the facts by the hearing officer.

The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code. As stated in Section 7-1 of the Code, the election of delegates and alternates ". . . to national nominating conventions . . . shall be made in the manner provided in this Article 7, and not otherwise." Also, see *Cousins* v. *Wigoda,* 463 F.2d 603, 606 (7th Cir. 1972), application for stay denied U.S. , 34 L. Ed. 2d 15, where the court said:

> "Illinois law may control, or may affect, the manner of selecting substitutes or alternates. Indeed the Rules of the National Convention contemplate reference to state law in connection with various issues."

The Rules of the National Convention state:

> "B-6. Adequate representation of minority views on presidential candidates at each stage in the delegate selection process * * * the Commission urges each State Party to adopt procedures which will provide fair representation of minority views on presidential candidates and recommends that the 1972 Convention adopt a rule requiring State Parties to provide for the representation of minority views to the highest level of the nominating process."
>
> "The Commission believes that there are at least two different methods by which a State Party can provide for such representation * * *. Second, it can choose

delegates from fairly apportioned districts no larger than congressional districts.

"C-5. Committee selection process * * * the Commission requires State Parties to limit the National Convention delegation chosen by committee procedures to not more than 10 percent of the total number of delegates and alternates. * * *

"When State law controls, the Commission recommends that State Parties make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose."

Elections in Illinois are, by the mandate of the Illinois Constitution of 1970 (Art. 4, § 3), "free and equal." The courts have long required that primary elections be free and open to all qualified persons. *Craig* v. *Peterson,* (1968) 39 Ill.2d 191; *People* v. *Deatherage,* (1948) 401 Ill. 25, 37; *People ex rel. Breckon* v. *Board of Election Commissioners,* (1906) 221 Ill. 9.

Malone v. *Superior Court in and for the City and County of San Francisco,* 40 Cal.2d 546, 551, 254 P.2d 517 (1953); *State ex rel. Cook* v. *Houser,* 122 Wis. 534, 100 N.W. 964 (1904); *Walling* v. *Lansdon,* 15 Ida. 282, 300-303 (1908); *Walker* v. *Grice,* 159 S.E. 914, 917-918 (S. Car., 1931); *Kinney* v. *House,* 10 So.2d 167, 168 (Ala., 1942); *Bentman* v. *7th Ward Democratic Executive Committee,* 421 Pa. 188, 199-203 (1966); *O'Brien* v. *Fuller,* 93 N.H. 221, 228, 39 A. 2d 220 (1944); *Lasseigne* v. *Martin,* 202 So.2d 250, 255 (La. Ct. of Appeals, 1967); *Shelly* v. *Brewer,* 68 So.2d 573 (Fla. 1953); *State ex rel. Merrill* v. *Gerow,* 79 Fla. 804, 85 So. 144, 146 (1920); *D'Alemberte* v. *State ex rel. Mays,* 56 Fla. 162, 47 So. 489, 499 (1908); *Application of McSweeney,* 61 Misc.2d 869, 307 N.Y.S.2d 88 (1970); *Currie* v. *Wall.* 211

S.W.2d 964, 967 (Tex. Civ. App., 1948); *Carter* v. *Tomlinson,* 220 S.W.2d 351 (Tex. Civ. App., 1949); *Morris* v. *Peters,* 46 S.E.2d 729, 738 (Ga., 1948); *State ex rel. Kennedy* v. *Martin,* 24 Mont. 403, 62 P. 588 (1900).

The right of an elected delegate to assume office is important not only to him, but to the electors of the party. In *State ex rel. Merrill* v. *Gerow,* 79 Fla. 804, 85 So. 144, the Florida Supreme Court stated:

"The rights acquired and the duties imposed by the primary election laws are valuable and important not only to those who acquire them under the law, but to the entire people of the State. Upon the manner in which these powers and duties are performed, depends to an appreciable degree, the welfare of the State. . . . . The rights acquired under a primary elections law are, therefore, of the same nature as those acquired under the general election laws, and to deprive a person of the rights acquired by the former is the equivalent of depriving him of his right to hold the office." (80 So. at 146).

The primacy of state law over the decisions of a national political party convention was detailed in an early decision of the Wisconsin Supreme Court in *State ex rel. Cook* v. *Houser,* 122 Wis. 534, 100 N.W. 964 (1904). There, a dispute arose between two groups of Republican party officials, each claiming that it had held a regular and proper state convention to choose candidates for the general elections and delegates to the party's national convention. Wisconsin statutes provided for the creation of a party tribunal to make determinations and advise the Secretary of State in such disputes. The officially designated tribunal decided for one group, the national convention for the

other. The court held that the determination of the national convention could not control the decision by the state tribunal authorized by statute. The court stated:

> "We do not find anything in any of such cases remotely, even, sustaining the proposition that the decision of the national convention of a party is superior to the decision of a state tribunal of the same party, where the latter tribunal is made the sole judge by legislative enactment, or otherwise.
> " • • •
> "In view of the foregoing, since the law of this state has provided the conditions under which the party nominees shall go upon the official ballot, how can it be reasonably said that the decision of the national convention of a party can nullify it? The answer seems so plain as not to warrant this extensive treatment of the matter. Nothing but the great importance of the case could be held to justify it. The moment the conventions performed their work of choosing candidates, the rights of such candidates to have their names placed upon the official ballot became irrevocable privileges, subject only to the legislative condition. That such condition could be displaced by any mere party authority, either within or without the state, dignifying it as paramount to the sovereign will of the people, and so binding its courts and its special tribunal created to decide the matter, does not seem to us to have support in reason or authority." (122 Wis. at 586, 589.)

Because election to the office of convention delegate in Illinois is governed by non-discriminatory state legislation, the instant case is not merely an intraparty factional dispute to be settled by party discipline. In this case, the law of the state is supreme and party rules to the con-

trary are of no effect. In *Malone* v. *Superior Court in and for the City and County of San Francisco*, 40 Cal.2d 546, 254 P.2d 517 (1953), the court stated:

> "The prospective witnesses contend, however, that courts will not interfere with affairs of political parties or committees and hence applicant could have no cause of action. (18 Am. Jur., Election, §§ 143, 144.) 'Where, however, statutes conferring legal rights on members of a political party have been passed, the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such question is of no binding effect. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization of rights derived from such election, the question being no longer solely a political one, but one of law of which the courts must take cognizance. The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority.' (18 Am. Jur. supra, Elections, § 143.) Certainly, where civil and property rights rather than politics and political dogma are involved, the court will protect them." (40 Cal.2d at 551.)

Courts are reluctant to intervene in intraparty disputes only where the right in question is not governed by statute. When, however, the subject matter is controlled by legislation, particularly the laws which provide for primary election to party office, the courts do not hesitate to assume jurisdiction. *Lasseigne* v. *Martin*, 202 So.2d 250, 255 (La. Ct. of App., 1967); 25 Am. Jur.2d, Elections, § 126, p. 811. Here the delegates were elected by a majority of the qualified Democratic electors in their respective districts. As such, under Illinois law, they are the legal representa-

tives of the party and of the people at the Convention. As stated by the Supreme Court of this state in *People* v. *Sweitzer*, (1918) 282 Ill. 171:

> "They are elected at a direct primary election of their respective political parties in which each member of the party is entitled to exercise his choice, and they are made the legal representative of their respctive parties. They are elected as the general representatives of the members of the party, and collectively they constitute the county convention for nominating candidates and may exercise all the powers of the political party in that regard." (282 Ill. 176.)

Once the delegates were chosen in a free, open and nondiscriminatory primary election, it became the legal duty of the party to carry out the mandate of the electorate. Once elected, any question of the delegates' qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts. *Allen* v. *Republican State Central Committee*, 57 So.2d 248, 251 (La. App., 1952).

A free and open election process is the cornerstone of our government. The right of a citizen to vote is a fundamental political right, preservative of all rights. *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Dunn* v. *Blumstein*, 405 U. S. 330, 31 L. Ed.2d 274 (1972); *Evans* v. *Cornman*, 398 U. S. 419, 422 (1970); *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968). The courts have consistently and jealously protected that right against denial, *Smith* v. *Allwright*, 321 U.S. 649 (1944), dilution, *Gray* v. *Sanders*, 372 U.S. 368 (1963), or even discouragement, *Williams* v. *Rhodes*, 393 U.S. 23 (1968). As stated by the Supreme Court in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966):

> "Long ago in *Yick Wo* v. *Hopkins*, 118 U.S. 356 . . ., the Court referred to 'the political franchise of voting' as a 'fundamental political right because preservative of all rights.' Recently in *Reynolds* v. *Sims*, 377 U.S. 533 . . ., we said 'Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' " (383 U.S. at 667.)

State and federal courts have gone to great lengths to open up the primary election process and to maximize the rights of citizens to participate therein. *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972) and cases cited therein; *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir., 1947), cert. denied, 333 U.S. 875 (1948); *People ex rel. Breckon* v. *Board of Election Commissioners*, 221 Ill. 9, 18-19 (1906); *People ex rel. Coffey* v. *Democratic General Committee*, 164 N.Y. 335, 341-42, 58 N.E. 124 (1900); *Bentman* v. *7th Ward Democratic Executive Committee*, 421 Pa. 188, 200-202 (1966); *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 So. 144, 145-147 (1920); *Carter* v. *Tomlinson*, 220 S.W. 351, 355 (Tex. Civ. App., 1949).

The interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect. See *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 So. 144 (1920); *Malone* v. *Superior Court in and for the City and County of San Francisco*, 40 Cal.2d 546, 254 P.2d 517 (1953);

People ex rel. Coffey v. *Democratic General Committee,* 164 N.Y. 335, 341 (1900); *Bentman* v. *7th Ward Democratic Executive Committee,* 421 Pa. 188, 198 (1966).

The legislature of the State of Illinois has established election machinery to guarantee the broadest possible citizen and candidate participation in the nomination process by providing for election of delegates to the national conventions. The defendants cannot be permitted to frustrate the state's interest in maximizing that participation. Party rules are not a law unto themselves. *Smith* v. *Allwright,* 321 U.S. 649, 663 (1944). As stated in *People ex rel. Coffey* v. *Democratic General Committee*:

> "The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus given effect, whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation, in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downward." (164 N.Y. at 341-342.)

The Illinois Supreme Court has demonstrated that it will enforce the right of Illinois citizens to maximum participation in the process by which candidates are nominated for a public office. In *People ex rel. Breckon* v. *Board of Election Commissioners,* (1906) 221 Ill. 9, relator filed a petition for a writ of mandamus to direct the defendant Board

of Election Commissioners to allow the Socialist Party to hold a primary election. The court stated:

> "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system unless he shall be chosen at a primary election, and this statute, which provides the methods by which that shall be done and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law. It is undoubtedly true, as urged by counsel for defendants, that it has become not only proper, but necessary, to provide additional safeguards and protection to the voters at primary elections, to the end that their will may be fully expressed and faithfully and honestly carried out, and any law having that object in view would naturally commend itself to the law-making power. The legitimate purpose of such a law, however, must be to sustain and enforce the provisions of the Constitution and the rights of the voters, and not to curtail or subvert them or injuriously restrict such rights." (221 Ill. at 18-19.)

The National Convention is an integral part of the process by which the President and Vice President of the United States are elected. The citizens of the state have an obvious interest in preserving the validity of their votes for delegates to the convention. *Gray* v. *Sanders,* 372 U. S. 368, 380 (1962); *Newberry* v. *United States,* 256 U. S. 232, 285, 286 (1921); *Georgia* v. *National Democratic Party,* 447 F.2d 1271 (D.C. Cir., 1971). In *Newberry* v. *United States,* Mr. Justice Pitney stated:

"[I]t seems to me too clear for discussion that primary elections and nominating conventions are . . . closely related to the final election . . . . So strong with the great majority of voters are party associations, so potent to the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations. . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." (256 U.S. at 285-286.)

Defendants' challenge rests on the premise they and various party functionaries are a force superior to the will of the voting majority and the votes cast for the delegates are somehow less significant than any other votes. This premise is diametrically opposed to the Illinois Constitutional guaranty of "free and equal" elections which holds that each vote is equal in its influence on the result as any other vote. *Craig* v. *Peterson*, 39 Ill.2d 191, 233 N.E.2d 345 (1968); *Moran* v. *Bowley*, 347 Ill. 148, 162-163, 179 N. E. 526 (1932). As early as 1886, the Illinois Supreme Court stated in *People ex rel. Grinnell* v. *Hoffman*, 116 Ill. 587 (1886):

"Elections are free, where the voters are subjected to no intimidation or improper influence, and where every voter is allowed to cast his ballot as his own judgment and conscience dictate. Elections are equal, when the vote of every elector is equal, in its influence upon the result, to the vote of every other elector,—when each ballot is as effective as every other ballot." (116 Ill. at 599.)

The right to effective candidacy for public and party office is an obvious corollary to the right to vote. *Hadnott* v. *Amos*, 394 U. S. 358, 364 (1969); *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Gonzales* v. *City of Sinton*, 319 F. Supp. 189, 190 (S. D. Tex., 1970); *Stapleton* v. *City of Inkster*, 311 F. Supp. 1187, 1189-1190 (E. D. Mich., 1970); see also "Constitutional Safeguards in the Selection of Delegates to National Nominating Conventions," 78 Yale L. J. 1228, 1247-1249 (1970). As stated by the District Court in *Gonzales*:

"It is equally certain that, to be guaranteed the full extent of the rights acknowledged by these franchise cases, plaintiffs must be granted the concomitant right to stand for office. A resident's vote for the candidate of his choice may have little meaning if no candidate speaks for the interests of that voter . . . ." (319 F.Supp. at 190.)

The right of the challenged delegates to stand for office is a right protected by the equal protection clause, *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), and by due process, *Williams* v. *Rhodes*, 393 U. S. 23, 41 (1968), (Harlan, concurring); *Briscoe* v. *Kusper*, 435 F.2d 1046, 1053-1054 (7th Cir., 1970).

We think the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats in the Convention and most certainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate. Such action is an absolute destruction of the democratic process of this nation and cannot be tolerated. Since the plaintiffs were admittedly elected to the position of delegates to the 1972 Democratic National Con-

vention by operation of the Election Code, an Illinois statute, this court finds the trial court's injunctions did not abrogate defendants' fundamental constitutional rights of free political association. Rather, we find the due process and equal protection rights of the plaintiffs and approximately 700,000 voters have been abrogated by the actions of the defendants.

The third issue presented for review is whether the courts of equity have jurisdiction over political controversies.

The defendants contend the action of the trial court in granting both the July 8, 1972, and August 2, 1972, injunctions was patently contrary to established Illinois law that courts of equity have no jurisdiction over political controversies. In presenting this contention for consideration, the defendants rely heavily on the decision of the Illinois Supreme Court in *People* v. *McWeeney,* (1913) 259 Ill. 161, a case in which both an injunction, issued to bar certain individuals from interfering with a city political meeting, and contempt proceedings, held subsequent to the violation of the injunction, were overturned by the Supreme Court.

This court finds no merit in defendants' contention that the trial court's action violated an established principle of Illinois law. The defendants' reliance on the decision in *People* v. *McWeeney* is not well taken since *People* v. *McWeeney*, in which no statute was in issue, most clearly states:

> "The general rule is well established that the judicial department of the government has no right to interfere with or attempt to control a citizen in the exercise of

> political rights unless the jurisdiction is expressly given by statute or by clear implication."

The people of this state have a right to rely on a statute and the courts have a duty to follow the terms of a statute.

The plaintiffs, as the defendants have admitted, were elected according to the provisions of the Election Code and were duly certified according to the provisions of the Election Code to be the delegates to the 1972 Democratic National Convention from their respective Congressional Districts. This court, therefore, finds both the statute and the requisite "clear implication" called for by the Supreme Court in *People* v. *McWeeney* present for a court of equity to take jurisdiction over this controversy.

The final issue presented for review is whether the trial judge's public comments on this action display a gross bias against the defendants.

The defendants contend that certain comments attributed to the trial judge display such bias against the defendants as to call the courts of this state into disrepute. The defendants further contend these comments demonstrate the defendants did not receive a fair hearing as guaranteed by the due process and equal protection clauses of both the U. S. Constitution and the Constitution of the State of Illinois. The basis for defendants' contention is certain newspaper articles in which statements attributed to the trial judge reflect what the defendants contend to be gross bias against them on his part.

The record reflects the trial judge, having received the instant cause on July 8, 1972, subsequent to a change of

venue taken by the defendants from another Circuit Court judge, held a hearing in which both plaintiffs and defendants participated. At the conclusion of the hearing the trial judge issued the first of two injunctions barring the defendants from acting or purporting to act as delegates to the 1972 Democratic National Convention. At no time prior to or during the course of the hearing on July 8, 1972, did the defendants present a motion for change of venue from the trial judge. Such motion was made by the defendants on July 20, 1972, nearly two weeks later. At that time the trial judge responded to the defendants' counsel regarding the comments attributed to him in those newspaper articles published subsequent to July 8, 1972, and thereafter denied the motion for change of venue to Lake County. The Illinois Venue Act (Ill. Rev. Stat., Ch. 146, § 8) clearly states:

> "§ 8. Neither party shall have more than one change of venue."

In view of this statutory section, and since the defendants' motion for a second change of venue was not made until 12 days after a hearing on the merits from which an injunction had issued, this court finds no merit in the defendants' contention that the public comments attributed to the trial judge in newspaper articles subsequent to their original hearing precluded them from receiving a fair hearing.

For the reasons stated herein, the orders of the Circuit Court of Cook County are affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

APPENDIX C.

FINDINGS AND REPORT
of
CECIL F. POOLE
Hearing Officer
Submitted to the Credentials Committee of the
1972 Democratic National Convention.
June 25, 1972

• • • • •

On May 26, 1972, the Honorable Patricia Roberts Harris, Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention, appointed the undersigned to act as Hearing Officer in the challenges filed against 59 of the Delegates and all 31 of the Alternate Delegates elected at the March 21, 1972 Primary in the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Congressional Districts of the State of Illinois.

Hearings were conducted in Chicago on May 31 and June 1, and again on June 8, 1972.

Both sides were represented by counsel and in person. Evidence, both oral and documentary was received, and the proceedings were reported by certified Court Reporters and their transcripts approximating 2,000 pages have been received and read. More than 500 exhibits, including affidavits and other documents, were introduced.

The Hearing Officer has weighed and considered all the evidence together with the inferences therefrom and does hereby first make the next-following Summary of Findings and then his Report to the Committee, as follows:

SUMMARY OF FINDINGS:

The Hearing Officer FINDS:

I. *Guideline A-5*

That the procedures by which the challenged delegates and alternates were selected in the Illinois Primary on March 21, 1972, violated in substantial respects the provisions of *Guideline A-5* in that the Democratic Party of Illinois did not at the time of the election have in effect explicit written rules, available and readily accessible, covering the delegate selection process, so drafted and publicized as to facilitate maximum participation among interested Democrats, and providing full information as to dates, times and places of meetings involved in the process.

That as a result, persons not already of the party organization, not familiar with or privy to the channels of intra-party communication and the usages of party power and structure, had little opportunity to participate, to be heard, or even to be aware of the times and steps at and by which critical decisions and selections came into being.

That the challenged slate of delegates was selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago and specifically and clearly identifiable as the party apparatus in Congressional Districts 1, 2, 3, 5, 7, 8, 9 and 11, to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate.

That the absence of plausible explanation as to the actual mechanism by which the prevailing slate of candidates was in fact assembled, contrasted with the evidence, abundant and probative, that their names then appeared upon sample ballots and slates without internal dissent among the 40 Ward and Township Committeemen and other party regulars making up the list, and thereafter supported, distributed and urged by party workers and officials, leads to the ineluctable conclusion that these were foreordained results of the violation of the requirements of openness and public involvement.

II. *Guideline C-4*

Guideline C-4, "Premature Delegation Selection (timeliness)", forbids Democratic Party echelons from practices by which officials elected or appointed before the calendar year of the convention either choose or endorse a slate of delegates. This rule was violated in letter and spirit in that there was a clear concert of act and deed among officials of the regular party organization in Chicago (none of them elected in the 1972 calendar year or for slate-making purposes), to accomplish the private selection of delegates; thereafter, to put the full weight, authority, prestige and support of the organization behind the candidacies of those thus chosen; and to discourage or to render ineffective parallel efforts by those outside the protective penumbra of the party's influence.

III. *Guideline C-6*

That the violations set forth as to Guidelines covering openness and timeliness involved for the same reasons a violation of C-6, slate-making, and that the violations of C-4 and C-6 were deliberate, covert and calculated.

As a result of the above, the Hearing Officer further FINDS:

IV. *Guidelines A-1 and A-2*

That the combination of the violation of the rules relating to procedure, notice, openness, timeliness and slate-making resulted in the election on March 21, 1972 of 59 of the organization's 62 slated delegates and of all 31 of its offered alternates; and that this produced a proposed delegation in which ethnic and racial minorities—Blacks and Latin Americans and women and young people under 30, were grossly underrepresented in disregard of the clear purpose of Guidelines A-1 and A-2.

In reaching this conclusion, the Hearing Officer has rejected the suggestion that the convention will, or that the rules should be interpreted to, impose—as the challengers seem to imply—upon the Democratic Party a commitment to a quota based upon or approximating group proportions in the general population. Any such principle would be encumbered by grave doubt in any case, but its application here is unnecessary because the underrepresentation found was so extreme as to indicate (with a high degree of conviction) that the Party has failed in its basic obligation to open up to fuller participation by those who have historically been excluded, as intended by the Guidelines and the Call to the 1972 Convention.

It is true that the Guidelines for Hearings, Rule 7(a), provides that upon a showing of underrepresentation, the burden is shifted to the challenged to show that "appropriate" action was taken to achieve the "proper" representation. The Hearing Officer interprets this rule simply as a

procedural device requiring the party to come forward and demonstrate affirmatively its bona fides in opening the heretofore closed portals and in inviting the outsiders in, and views it in the light of all the other circumstances and human motivations which bear upon the invitation and its disposition.

The challenged in this case have not sufficiently gone forward with the burden of that issue.

Analysis of the Challenges

1. The Challengers, ten in number, residents of Illinois and members of the Democratic Party, contest the seating at the 1972 Democratic National Convention of 59 persons seeking to be seated as "uncommitted" delegates and 31 persons seeking to be seated as "uncommitted" alternates, as the successful candidates from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts, lying in whole or in part within the City of Chicago, Cook County, Illinois, all of whom were elected at a primary held March 31, 1972. The names of the challenged parties and of the challengers appear in the record.

2. The 59 challenged delegates represented include all but three of the successful candidates at the primary election in the above eight districts. The three additional elected delegates and three additional elected alternates, not under challenge, were committed to the candidacy of Senator Edmund Muskie.

The challenge is based upon the allegation of violations of Guidelines A-1, A-2, C-1, C-4 and C-6 of the Report of the Commission of Party Structure and Delegate Selection to the Democratic National Committee as they have been

incorporated into Article III, Part I, of the Call of the 1972 Democratic National Convention.

The challenge claims violations of the guidelines in two major respects:

1. Minorities (including Latin Americans and Blacks), women, and persons between 18-30 are grossly underrepresented among the proposed delegates and in all Chicago Democratic Party affairs (A-1 and A-2); and

2. The proposed delegation as to delegates and alternates was slated, endorsed and supported by the Democratic Party organization of Chicago without open slatemaking procedures, without public rules relating thereto, and by Party officials who had themselves been chosen prior to 1972.

The Guidelines Provisions In Question

Guideline A-1 refers to the resolution adopted at the 1964 National Convention conditioning the seating of delegates at future conventions on the assurance of non-discrimination in any State Party on account of race, color, creed or national origin. In describing the adoption by the 1968 Convention of that 1964 Resolution and the inclusion of the same in the Call of the 1972 Convention, the guideline refers also to the adoption by the Democratic Convention in January 1968 of six anti-discrimination standards ("the Six Basic Elements") for parties to meet. All of the above was designed to insure full opportunity for all minority groups to participate in the delegate selection process to supplement which the Commission requires that:

1. State Parties add the Six Basic Elements to their party rules and take appropriate steps to secure their implementation;

2. State Parties overcome the effects of past discrimination by affirmative steps to encourage minority group participation, including representation of minority groups on the delegation "in reasonable relationship to the group's presence in the population of the state".

A footnote states that this is not to be accomplished by the mandatory imposition of quotas.

Guideline A-2 states that discrimination on the grounds of age or sex is inconsistent with the full and meaningful opportunity to participate in the delegate selection process. The Commission requires State Parties to eliminate such discrimination and to overcome the effects of past discrimination by affirmative steps to encourage representation on the delegation of young people (18-30) and of women in reasonable relation to their presence in the population of the state.

Again, the footnote cited states that this is not to be accomplished by the mandatory imposition of quotas.

Guideline A-5—*Existence of Party Rules*

Requires State Parties to adopt and make available the rules relating to the delegate selection process; to adopt rules which will facilitate maximum participation among interested Democrats in that selection process and specifically providing for dates, times and public places of meetings.

The Commission also requires State Parties to adopt rules which will facilitate maximum participation among interested Democrats in the selection process.

Guideline C-1—*Adequate Public Notice*

The rule requires state parties to assure voters an opportunity to "participate fully" in party affairs. This includes adequate public notice including the publicizing of time, places and rules for the conduct of all meetings of the party. Parties are also required to circulate concise and public statement in advance of the election itself on the relationship between the party business to be voted upon and the delegate selection process.

Guideline C-4—*Premature Delegate Selection* (Timeliness)

The Call to the 1972 Convention includes the requirement that the delegation selection process must begin within the calendar year of the convention. The guideline provides that the practice by which state chairmen, state, district or county committees select, or chose agents to select, the delegate is inconsistent with the Call; that the rule prohibits any untimely procedures which have any direct bearing on the processes by which National Convention Delegates are selected, and the process by which the delegates are nominated is such a procedure. Therefore, parties are prohibited from practices by which party officials elected or appointed before the calendar year chose nominating committees or propose or endorse a slate of delegates—even when the possibility for a challenge to such slate or committee is provided.

Guideline C-6—*Slate-making*

The process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected and parties are required to extend to the nominating process all guarantees of full and meaningful opportunity to participate in the delegate selection process.

Whenever slates are presented to caucuses, meetings, conventions, committees or to voters in a primary the rule requires that the party have adopted procedures which assure:

1. That the bodies making up the slates have been elected, assembled or appointed for the slate-making task with adequate public notice that they would perform such task;

2. That the persons making up the slate have adopted procedures which facilitate wide-spread participation in that process.

3. That there be safeguards provided to assure that the right to challenge the presented slate is more than perfunctory.

THE EVIDENCE

A. *The Party Structure*

The Democratic Party organization in Cook County, Illinois is headed by the County Central Committee consisting of the 50 Chicago Ward Committeemen and 30 Township Committeemen for a total of 80. The chairman, currently

the Mayor of Chicago, is chosen by the committee members and in turn appoints an Executive Committee (RT 825). The nominal parent organization is the Illinois State Central Committee which has 24 members, one for each congressional district, is invested by law with certain general oversight of party affairs in Illinois. The testimony showed that the slating of candidates has historically been carried out as a joint function of the State Central Committee along with a group selected by the Chairman of the Cook County Central Committee. The State Committee was not shown to exert substantial control over the affairs of the County Committee. In Cook County precinct captains in each ward are appointed by the committeeman from that ward. Under them are hundreds of precinct workers who in former days were beholden to the committeeman for jobs and other political emoluments. The precinct captain keeps track of voters and of general precinct affairs. They hold jobs such as clerks, elevator operators, sewer and building inspectors, etc. They are not civil service, and when there is a turnover in a political job-dispensing office, these people lose their jobs. A witness described this as "patronage jobs". (RT 861) Although there was testimony that a recent court decision resulted in an order banning certain types of patronage manipulation, the evidence is clear that the practice still thrives.

Meetings of the Cook County Central Committee are not usually preceded by public notice although some are and the public and press may attend when certain statutory functions are being conducted. Meetings held for the purpose of selecting and endorsing candidates for public office are not open until after the decision has been made, at

which time the endorsed candidates may be brought in and introduced to the persons present (RT 829). The same general procedure has in the past been applicable to the slating of congressmen and delegates to the National Convention. Selection of congressmen has apparently been an harmonious and cooperative procedure. Theoretically the selection is made by the vote of the ward and township committeemen, each casting the number of votes equal to the votes cast in his ward or township in the last preceding election. The testimony was that in fact a consensus is usually arrived at quickly in the case of congressmen (RT 832).

Under the old procedure for the selection of delegates to the National Convention, two were formerly elected from each Congressional District and a larger number selected at large in convention. One witness, involved and experienced in party affairs, testified that the general pattern was for the ward committeemen in the district to rotate with each other from one convention to the other in filling the 48 convention delegates leaving 60 or 70 seats to be appointed by the State Convention; that those selected were typically office holders and party officials (RT 835). There were formerly no written party rules covering the whole process. It was shown that the Democratic Party in Illinois introduced in the legislature in 1971 a number of statutory measures designed to bring the election code of Illinois into conformity with the spirit and the letter of the Commission guidelines. These efforts were effective, (1) in permitting for the first time the candidate for delegate to state his preference or to list himself as uncommitted; (2) in changing the formula by which delegates were ap-

portioned so that each congressional district was apportioned based on its population and the vote cast by it in the preceding presidential election; and (3) finally to move into the current year of the convention the deadline for filing candidacies for delegate. In addition to that, the Democratic Party of Illinois finally adopted written rules which became effective in April 1972 but not effective at the election which is here under contest.

B. *The Chicago Party Organization and the Selection of Candidates in Chicago*

In former times selection of candidates for delegate and alternate was accomplished by the party organization through slating procedures now forbidden by the guidelines. There was testimony and substantial evidence and the hearing officer finds that the 59 challenged delegates were selected by procedures which in major part still reflected the forbidden slating method and in major part too was arrived at out of public view but with the unmistakable indicia of clear understanding and mutual cooperation among all the echelons of Cook County organization from the Chairman down through the Ward Committeeman.

There was testimony that at a meeting prior to the election, the Chairman, adverting to the guidelines, stated in a committee meeting that the delegates would be elected as they always had been (RT 847); that he "didn't give a damn" about the [McGovern] rules (RT 1016).

There was testimony that a candidate for delegate had expressed a desire to list a preference for president and requested permission from the Chairman to run committed

to that candidate, but was told by the Chairman that the organization had to "stay together on this" (RT 858).

A Chicago Alderman, himself a challenged delegate testified for the challengers (requiring therefore, in the Hearing Officer's judgment, careful scrutiny of motive and bias but eventually given probative value). He stated positively that a closed meeting of the Party members in Chicago was convened on February 24, 1972 following a meeting of the County Central Committee; that there was discussion by the Chairman about the need for making it clear just who were the organization-supported candidates; and insisting that the organization had the right "to express its views on the selection of delegates" (RT 1013-1018).

The same witness testified that in December 1971 he had been invited to attend a luncheon of organization members at which delegates to the convention from the 9th Congressional District were to be discussed (RT 1067). The witness declined the invitation and a counter-affidavit (Exhibit 18-10) by Scott Hodes (from whom the invitation issued) describes the luncheon as simply a "Christmas Party Luncheon get-together" for the Democratic Committeemen at which no discussion concerning delegates took place.

In an affidavit (Exhibit 7-5) Alderman William Singer related a conversation held on January 8, 1972 with Mr. John Merlo (44th Ward Regular Democratic Committeeman) about candidates for the 9th Congressional District. According to the affiant, Merlo told him that the "Regular Organization" was going to slate Messrs. Huppert, Hartigan, Wigoda, Tuchow, Hodes, Lerner and Ms. Hedlund. The affidavit continues:

"* * * When I indicated that that was only seven and there were eight candidates to be elected, Mr. Merlo turned to Judge Kenneth Wendt and said, 'Who's that other candidate that Danny O'Brien [44th Ward Alderman Daniel P. O'Brien] put up for delegate?' Mr. Merlo then answered his own question by saying, 'I think he's a young kid named Paul Stepan, but I don't know him'. Mr. Merlo then also indicated that Steven Yates had been 'put up' for the position of alternate delegate."

Mr. Merlo has filed a counter-affidavit (Exhibit 18-22) confirming that a conversation was held but stating:

"* * * Alderman Singer asked if I knew who the delegates would be and I answered I did not.

"I do remember Judge Wendt saying he hoped that a fine young man like Steve Yates would run, and I replied that if he did, I sure would like to see him win. "No slate of names were mentioned as I had no knowledge of who the delegates would be."

It is the fact that thereafter the names of all those mentioned in Alderman's recital, above, appeared on the sample ballots for the 9th District.

Eventually there emerged slates of delegates in each congressional district supported by the identifiable party organization and structure. The Chairman, Mayor Daley, and 37 of the 50 Chicago Ward Committeemen were on the slate plus 3 of the committeemen who filed for the position of delegate appeared on the sample ballots distributed by the organization. Many of the other slated candidates are identifiable as persons connected with the organization, such as the County Clerk, the Sheriff of Cook County, the President of the Chicago City Council, in-laws or relatives

of committeemen, the son of Chairman Daley, other party officials, party candidates for public office and persons described as "confidantes" of the Chairman or otherwise affiliated with the Democratic organization. In no district did more ward committeemen and other organization officials file than were delegate positions available. In each case, prior to the March 21, 1972 Primary Election, precinct party workers circulated in all the Congressional Districts the sample ballots and slates, by whomsoever ordered, on which candidates supported by the organization were named with an "X" in the boxes opposite their names while all other candidates (i.e., those not supported by the organization) were un-named and identified only as "other candidate".

Abundant evidence in scores of affidavits (see Exhibits 4-1 through 4-46) established that precinct workers throughout the challenged districts distributed these same ballots to residences, offices and on the street, and that they urged the support of the persons listed as the "organization" or "machine" candidates, and generally conveyed the message that the regular party organization in Chicago had and was supporting its own slate of candidates for delegate and supported none other.

Other affidavits (Exhibits 5-1 through 5-48) disclosed a wide-spread pattern of Primary day electioneering by precinct workers who checked to see that voters had brought the sample ballots with them to the polls, and who urged such voters to vote the straight organization supported tickets.

Counter-affidavits—of which Exhibits 14-10 (Congressman George W. Collins), 14-11 (Illinois House of Represen-

tative Isaac Sims) and those of Delegates Neil Hartigan (18-3), Jerome Huppert (18-5), Marilou Hedlund (18-8), are among the many which have been read and considered. They detail each affiant's account of the manner in which she or he came to run for the position of convention delegate and in general show impressive histories of party service and interest. Some of the office-holders invoke the aspect of name-recognition as accounting for their success on March 21; each insisting that his decision to run was arrived at independently without reliance upon any commitment by the regular party organization or party officials. Their reconciliations of the appearance of their respective names on the sample ballots are not as specific as are their denials of concerted action. Mr. Sims did assert in his affidavit that he ordered the printing of sample ballots and that he did so;

> "* * * because he was requested to do so by many of his friends living within the 28th Ward. He further states that he listed seven other delegates on the sample ballot because, in his opinion, a sample ballot with only his own name listed with an 'X' would mislead voters so that only one vote would be cast when each voter had the right to cast ballots for eight individuals running on the official ballot. It was his opinion that if he marked only one 'X' he would in effect, be disenfranchising such persons from seven of their votes. He listed as persons also recommended on the slate, friends of his who were running as uncommitted Delegates because those persons listed on the ballot with a presidential preference did not reflect his personal preference for the nomination of the Democratic candidate for President in 1972."

From the mass of sharply conflicting evidence, there emerges a clear pattern of concerted action by the organization in the use of its influence and prestige in support of its regulars, encouraging their candidacies, agreements on numbers, cooperation in the preparation of sample ballots, their widespread distribution by party workers, their prominence at headquarters of ward officials, and the formidable array of party power in behalf of its preferred candidates.

All of this compels the irrefragable conclusion, and the Hearing Officer finds, that Guidelines C-1, C-4 and C-6 have been violated in the nomination and election of the challenged delegates and alternates in Chicago.

C. *Composition of the Chicago Delegation*

The most immediately remarkable feature of the delegation under challenge is its impressive collection of Ward and Township Committeemen, 40 in number, along with the Secretary of the Cook County Central Committee and headed by the Chairman, Mayor Daley. This appears in Exhibit "A" to this report. Only one of these is a woman—Ward Committeewoman Lillian Piotrowski.

A document entitled "Official Results of Votes Cast in Cook County Primary Election held Tuesday, March 21, 1972" which was issued by the County Clerk of Cook County, was admitted into evidence as Exhibit 2 (b). It sets forth the votes received by each candidate in each of the eight Congressional Districts involved in this challenge, and is attached to this Report as Exhibit "B".

During the testimony of Pierre De Vise (RT 1274-1331), a City Planner and Demographer called on behalf of the

challengers, the exhibit was given symbols to identify, as far as possible, each of the elected Delegates and Alternates as belonging to the groups referred to in Guidelines A-1 and A-2. The symbols used, as seen on this current Exhibit "B" are:

F — Female

B — Black

LA — Latin-American

Y — Young (18 to 30)

These figures are considered against a backdrop of the evidence produced in the testimony of witness De Vise. He introduced 1970 Census figures for Chicago which put the 1970 total population at 3,355,000 of which approximately 33% were Blacks and 9% Latin American. (RT-1275 et seq.). It was the witness's testimony that this represented an undercount of 10% for both ethnic groups; that by March 1972 Blacks constituted 37% of the Chicago population (1,323,000), while Latin Americans constituted 10% (320,000).

He placed the presence of women in the population at 52%, and of those between the ages of 18 and 30 at 30%, although he did not break down the cohort of those in the respective sex-age-ethnicity categories. [To some extent we have refined the breakdown in the charts, infra.]

By Congressional District he estimated the Latin American and Black population totals and percentages as follows:

District	Black Number		%	Latin American Percentage Only
First	411,599	—	89%	0%
Second	184,376	—	45%	07%
Third	24,075	—	06%	0%
Fifth	145,254	—	34%	10%
Seventh	255,230	—	59%	19%
Eighth	83,109	—	20%	18%
Ninth	21,287	—	04%	12%
Eleventh	927	—	0%	02%

Combinations of the symbols have been employed as indicated. The breakdown of the elected delegates pursuant to the symbol is:

Delegates:

District	F	B	LA	Y	FBY	F/LA	F/LA/Y	BY	LA/Y	FY	FB
1st		5			2						
2nd		1		1							
3rd											
5th	1	1		2							1
7th		2									
8th				1	1	1	1				
9th	3			1							
11th											
Totals	4	9		5	3	1	1				1

Alternates:

District	F	B	LA	Y	FBY	F/LA	F/LA/Y	BY	LA/Y	FY	FB
1st		2									
2nd		2	2								
3rd	2										
5th	1	1									
7th		1				1					
8th	1	1									
9th			1							1	
11th										1	
Totals	4	7	3		1					2	

The challenged delegation includes nine male and three female Blacks for a total of 12;

four Caucasian females;
two Latin-American females; and
five Caucasian youths under 30.

The inclusion of only nine females out of 59, given the proportion of women (of all ages, color, creed and races) in the general population, is suspicious at best. It would not, however, be proof of actual discrimination by itself. But to this must be added the testimony of the former President of the League of Women Voters, Mrs. Jeannette Stessl (RT 649-710), that in her extensive experience there had been little or no effort made by the organization to really involve women in important and meaningful activities of the party. She further testified that a party worker visited her home prior to the 1972 primary and brought a sample ballot which he urged her to follow. Mrs. Stessl inquired as to why there were so few women listed and whether this activity did not violate the guidelines. The worker, an Assistant States Attorney in Cook County, responded that he did not know what the guidelines were but that anyway, "they'll fix that up in Miami". (RT 664). He also said that women didn't belong in politics.

Whether the above remarks reflect party feelings or were simply the utterances of a political journeyman, it is a fact that the delegation is grossly underrepresented not only as to women but also (with the outstanding exception of the 1st Congressional District and to a lesser extent the 9th) as to Blacks, the young and Latin-American citizens.

In view of the discussion and findings with respect to Part B, above, as to the role of the party structure in the delegate selection process, the Hearing Officer concludes that the selectivity which so heavily favored entrenched office-holders and regulars was also operative in the choosing of women, the young, and racial minorities, and that it discriminated against them invidiously and substantially. This is not because such persons have a legitimate claim to party office and perquisites on a mathematical or proportionate basis. Many other factors combine to affect that result: interest, capacity, loyalty, name-recognition, popularity, and the like. And eventually, by virtue of all these elements, and oftentimes despite them, the ultimate judges—the electors—give their own impeccable verdict in the secrecy of the voting booth.

The Hearing Officer concludes, and finds, that the underrepresentation complained of was not the result of fortune, unaffected by the efforts of the organization, but was a continuation of the same conditions exposed in the Commission Report and came about because, although diligent in including its own regulars, the organization in Chicago expended no such resources on the segments of the population as required by Guidelines A-1 and A-2.

The Hearing Officer accordingly finds that those Guidelines have been violated both in letter and in spirit.

CONCLUSION

For the reasons hereinabove set forth, the Hearing Officer finds and reports to the Credentials Committee of the 1972 Democratic Convention that in the election of Delegates and Alternate Delegates in the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Congressional

Districts of the State of Illinois, Guidelines A-5, C-1, C-4, C-6 were violated and thereafter Guidelines A-1 and A-2 were also violated.

Respectfully submitted, June 25, 1972.

CECIL F. POOLE
Cecil F. Poole, Hearing Officer

APPENDIX D.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 72-1628
WILLIE BROWN, ET AL., Appellants
v.
LAWRENCE O'BRIEN, ET AL.

No. 72-1629
THOMAS E. KEANE, ET AL., Appellants
v.
NATIONAL DEMOCRATIC PARTY, ET AL.

No. 72-1630
THOMAS E. KEANE
v.
NATIONAL DEMOCRATIC PARTY,
ET AL., Appellants

No. 72-1631
THOMAS E. KEANE, ET AL.
v.
NATIONAL DEMOCRATIC PARTY, ET AL.
WILLIAM COUSINS, ET AL., Appellants

On Appellants' Motions for Summary Reversal

Decided July 5, 1972

Before BAZELON, *Chief Judge,* FAHY, *Senior Circuit Judge,* and MACKINNON, *Circuit Judge.*

Per Curiam: These two cases, which have come before us on motions for summary reversal and expedited consideration, call into question the power of the Democratic Party to exclude from its 1972 national convention certain challenged delegates from California and Illinois. In both cases delegates unseated by action of the credentials committee of the national convention assert that they were expelled in violation of rights guaranteed by the Constitution. The district court dismissed the complaints in both cases, upholding the action of the credentials committee. In No. 72-1630 we affirm the district court's judgment dismissing the complaint of Illinois plaintiffs, and, for the reasons set forth below, we remand the case to the district court for entry of an order barring these plaintiffs from taking action in any other court that would impair the effectiveness and the integrity of the judgment of this Court. In No. 72-1628 we reverse the judgment of the district court and remand the case to that court for entry of an order declaring defendants' action null and void, and enjoining defendants from excluding these elected California delegates because of their selection in a winner-take-all primary.

I.

The California Challenge

California plaintiffs are 151 persons who ran in a statewide primary election on June 6, 1972, as part of a 271 person slate committed to the presidential candidacy of Sen. George McGovern of South Dakota. Sen. McGovern won the California primary with a plurality of the vote, roughly 43 per cent, and under the winner-take-all provi-

sion of the California primary election law,[1] the entire 271 person slate was designated as the California delegation to the national convention. A challenge was then brought against the California delegation on the grounds that the winner-take-all feature of the California primary law was invalid under rules adopted by the Democratic Party in 1971—the so-called McGovern Commission guidelines. The hearing examiner appointed by the credentials committee rejected the challenge and it was renewed before the full committee on June 29, 1972. At that time the challengers apparently dropped the allegation that winner-take-all was inconsistent with the McGovern guidelines, and maintained that it violated the mandate of the 1968 convention. With California's representatives on the credentials committee not voting, because their delegation was under challenge, the credentials committee passed by a six vote majority the following resolution:

> WHEREAS the 1968 Convention guaranteed to all Democrats, a "full, meaningful and timely opportunity" to participate in the delegate selection procedures of our party, and
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> WHEREAS the California winner-take-all primary election held on June 6, 1972 denied that opportunity to participate to almost two million Democratic voters, and
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> WHEREAS the California winner-take-all primary functionally disenfranchised 56% of the California Democratic electorate who did not vote for George McGovern, and
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> WHEREAS the California winner-take-all primary awarded 100% of the delegate votes of the State

[1] *See* Calif. Elections. Code §§6300-93, and in particular §6386.

of California to the McGovern slate, while awarding no delegates to other candidates who received votes of California Democrats—Humphrey, Muskie, Wallace, Chisholm, Jackson, McCarthy, Lindsay and Yorty,—in spite of the fact that proportional representation is an integral party of the 1968 reform mandate of the Democratic National Convention, and

WHEREAS a majority of the California Democratic electorate will have no representation or voice in the 1972 Democratic National Convention under the proposed California delegation of Senator McGovern, in contradiction to the entire thrust and spirit of Party reform in the Democratic Party over the last four years, now therefore,

BE IT RESOLVED by the Credentials Committee of the 1972 Democratic National Convention, that the California delegation not be seated as presently constituted, that a delegation apportioned on the basis of proportional representation be substituted in its place, that the formula for this representation be directly proportional to the votes cast by the Democratic voters of the State of California in the June 6, 1972 primary, that this voting results in the election of 106 Humphrey delegates, 16 Wallace delegates, 12 Chisholm delegates, 6 Muskie delegates, 4 Yorty delegates, 3 McCarthy delegates, 2 Jackson delegates, 2 Lindsay delegates, and 120 McGovern delegates, and the appropriate number of alternate delegates in all cases, and

BE IT FURTHER RESOLVED that those delegate positions be filled by an open and representative procedure—in the case of 120 McGovern delegates, a caucus of the 271 individuals on the McGovern slates, for all other candidates with the exception of Governor Wallace, a caucus of the

respective California slates, and for the Wallace positions, an open caucus to be held in the State of California, with adequate public notice, not later than July 5, 1972, that all delegates included on the California delegation as reconstituted be selected consistent to the A1 and A2 provisions of the Call for the 1972 Democratic National Convention which calls for reasonable representation of women, youth and minorities, so that the % of these groups, blacks and chicanos does not decrease, and that the names of all members of this newly constituted and equitable California delegation be presented to the Secretary of the Democratic National Committee before July 7, 1972 who will certify such names as the California delegation to the 1972 National Convention.

In their complaint, the excluded California delegates assert that their expulsion was in violation of, inter alia, their constitutional right to due process of law. We have no difficulty concluding that defendants' action against these delegates was state action. See Terry v. Adams, 345 U.S. 461 (1953); Georgia v. National Democratic Party, 447 F. 2d 1271 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 858 (1971). We also conclude, for the reasons described below, that expulsion of these 151 California delegates was inconsistent with fundamental principles of due process.

At the heart of the controversy in these two cases are the guidelines on delegate selection promulgated by the McGovern Commission in April, 1970, and adopted by the Democratic National Committee in February, 1971. One of these guidelines, B-6, deals with the representation of minority views on presidential candidates at each stage of the delegate selection process. That guideline urges

State Parties to adopt procedures which will provide fair representation of minority views. But the guideline explicitly stops short of abolishing the winner-take-all provision. Thus, the examiner who initially heard the challenge to the California delegation made findings as follows:

4. The parties stipulated during the hearing that the McGovern Commission gave full and careful consideration to requiring the abolition of the winner-take-all concept at least at the state level, and decided not to make its abolition mandatory. The other evidence presented at the hearing confirmed this stipulation.

5. The language of Guideline B-6 itself supports the stipulation. In contrast to other Guidelines, it uses the word "urges" instead of the word "requires" with respect to the proceedings specified.

Plaintiffs also submitted an affidavit indicating that at a meeting of the McGovern Commission on November 19, 1969, a Commission member proposed that the guidelines "require" the abolition of winner-take-all provisions for 1972. The proposal was apparently defeated by a vote of 13 to 3. The understanding that winner-take-all was still a viable concept for the 1972 convention was also reflected in *The Call for the 1972 Democratic National Convention.* The Call incorporates the resolution of the Democratic National Committee adopting the McGovern guidelines, and it reiterates the distinction between guidelines which the state parties are "required" to adopt, and those which they are "urged" to adopt.

The hearing examiner also found that the State Democratic Party of California relied on representations made by authoritative spokesmen for the national party. The examiner indicated that:

6. Congressman Donald A. Fraser and Robert Nelson of the Commission on Party Structure and Delegate Selection testified to negotiations with the California Democratic Party on compliance with the Guidelines. With respect to B-6 their testimony was that although California was urged in the early part of the negotiations to take steps to abandon the winner-take-all primary, it was assumed at all times that that was not a requirement for compliance with the Guidelines for the 1972 Convention.

7. The final letter from Congressman Fraser to Mr. Stephen Reinhardt of California, dated April 28, 1971 (Challengers Exhibit G) states (page 2):
   "Although Guideline B-6 'urges' state parties to adopt procedures which provide for fair representation of minority views on presidential candidates, it does not require that the winner-take-all statewide primary be abolished in selecting delegates. Therefore it is permissible to use this system in California in 1972."

8. In a letter dated February 1, 1972, (Respondents Exhibit 5) from Lawrence O'Brien to Mr. Charles T. Manatt, Democratic State Chairman, Mr. O'Brien said that "the Fraser Commission informs me that the California Party is in full compliance with the Guidelines." This was confirmed in a similar letter to Mr. Manatt, dated February 7, 1972, from Robert W. Nelson, Staff Director of the Commission (Respondents Exhibit 6).

9. The evidence establishes that all interested persons and organizations, including the candidates, acted in reliance on the fact that Guideline B-6 did not outlaw the winner-take-all statewide primary as a method of delegate selection in 1972.

Conceding no support for their action in the Call to the Convention or the McGovern guidelines, defendants would justify the expulsion of these plaintiffs solely on the Credentials Committee's construction of the resolution adopted by the 1968 national convention. That resolution, which initiated the process of reform and provided the mandate of the McGovern Commission's action, stated:

> Be it resolved, that the call to the 1972 National Democratic Convention shall contain the following language:
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> It is understood that a State Democratic Party in selecting and certifying delegates to the National Convention thereby undertakes to assure that such delegates have been selected through a process in which all Democratic voters have had a full and timely opportunity to participate.
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> In determining whether a state party has complied with this mandate, the Convention shall require that:
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> (1) The unit rule not be used in any state of the delegate selection process, and
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> (2) All feasible efforts have been made to assure that delegates are elected through party primary, convention or committee procedures, open to public participation within the calendar year of the National Convention.

Defendants now seek to characterize the action of the credentials committee as reflecting a determination that

"insofar as Guideline B-6 permits the selection of delegates on a winner-take-all basis, in disregard of the views of minorities within the state parties, it is invalid under the mandate of the 1968 Convention and therefore is of no force or effect." Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, July 3, 1972, at 38.

Plaintiffs respond—in our view, with great force—that nothing in the 1968 resolution can reasonably be seen as a prohibition of winner-take-all provisions. They point out that (1) the resolution specifically bars the unit rule, but makes no mention of the winner-take-all concept; (2) the resolution has been consistently interpreted since 1968 as not requiring abolition of winner-take-all, and assurances to that effect were repeatedly offered to the California state party; (3) the 1968 *Report of the Commission on the Democratic Selection of Presidential Nominees* (Hughes Commission), a critical part of the "legislative history" of the 1968 resolution, gives no indication that abolition of winner-take-all was a part of the 1968 reform package. On the contrary, while laying the groundwork for the convention resolution and the McGovern Commission, the report of the Hughes Commission clearly states that:

> [t]he Commission does not, however, flatly condemn the winner-take-all principle in state primaries, since such primaries offer a useful device for engaging popular interest and involvement in the process of selecting a President.

Report at 19.

In resolving this question we begin with a firm conviction that the political parties must have wide latitude in

interpreting their own rules and regulations. And we recognize that this latitude must be especially wide where, as here, a reviewing court is hampered by severe shortage of time which prevents a prolonged inquiry into the meaning of the rules. But on the basis of the record now before us and the argument we have heard, we are compelled to conclude: (1) that the provision of the 1968 resolution invoked to justify the exclusion of these delegates is vague and indeterminate—requiring this action, if at all, only by innuendo; (2) that nothing in the statements made at the time of the adoption of that resolution or in its subsequent interpretation by the Guidelines and party officials suggests that it was ever understood to enact a ban on winner-take-all; (3) that plaintiffs and the State of California acted in justifiable reliance on the continuously reiterated assurances of Democratic Party officials that winner-take-all was not proscribed; and (4) that the Democratic Party did not merely interpret one of its rules—in essence, it acted in defiance of its own rules as interpreted in the Call for the 1972 Convention by establishing retroactively an entirely new and unannounced standard of conduct.

The question remains, therefore, whether the Constitution bars the Democratic Party from changing the rules after the election has been held. We recognize that some consider the change adopted by the Party to be a laudable one and the direction of recent attempts at Democratic Party reform is quite plainly toward the principle of proportional representation and maximum participation of minority views. But the process by which that result is reached is necessarily as important as the result itself.

We cannot be blind to the fundamental deficiencies in the fairness of the process of reaching that result. Nor can we overlook the injuries to which those deficiencies gave rise.

If the party had adopted a ban on winner-take-all prior to the California primary election, the candidates might have campaigned in a different manner, devoting more or less time and resources to the state. Voters might have cast their ballots for a different candidate;[2] and the State of California might have enacted an alternative delegate selection scheme that would comply with party rules and that might be more responsive to its own state interests than the pure proportionality of representation that was imposed by the credentials committee.[3] The interests of the political candidates, the voters of California, and the State of California are plainly substantial, and the injury to these interests might itself require our intervention. But the fundmental basis of our action is the grave injury to the fairness and legitimacy of the process of electing the President of the United States. As a nation we can tolerate, and even welcome, disputes about the merits of

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[2] It has been suggested, for example, that voters who cast ballots for one of the front-runners in the race might have voted for another candidate if they had been aware that delegates would be divided in proportion to votes. Plaintiffs also suggest that certain presidential candidates may have dropped out of the race on the assumption that only the winner would be awarded any delegates.

[3] Thus, the State of California might have enacted a scheme whereby delegates are divided by congressional district, with all of the delegates for each district being awarded to the candidate who obtained the most votes in that district. See guideline B-6.

different rules which might govern the election of the President. It may well be, for example, that direct election of the President is more fair than indirect election by the electoral college, and that distribution of delegates in proportion to votes received by the candidates they represent is more fair than winner-take-all. These are questions about which reasonable men can differ. But there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force. The decision of the Party to exclude these 151 delegates, who were elected in compliance with each of the party's applicable rules then in force, jeopardizes the integrity of the election process, and it therefore injures every voter in the United States and every individual and institution which is subject to the authority of the President. Because we are convinced that the process of electing the President of the United States is not, and cannot be, placed outside the rule of law, we set aside the arbitrary and unconstitutional action of the Democratic Party.[4] The case is remanded to the district court for entry of an order declaring defendants' action against these plaintiffs null and void, and enjoining defendants from unseating these duly qualified and

[4] Plaintiffs argue that their exclusion violated not only their rights to due process of law but also to equal protection of the laws. They assert that delegates from twelve states were selected pursuant to some variant of the winner-take-all principle, and they protest the application of this new rule against only the California delegation. In view of our resolution of the due process contention, we express no opinion on the merits of the equal protection argument.

elected delegates to the national convention because they were selected in a winner-take-all primary election.

II.

The Illinois Challenge

The Illinois case involves a challenge to the seating of a group of 59 uncommitted delegates elected pursuant to state law, from various congressional districts in Northern Illinois.

After the Illinois delegate primary was held on March 21, 1972, a challenge was filed to the seating of the delegates in question on the ground that several of the guidelines of the Democratic National Party, promulgated by the McGovern Commission in April, 1970, had been violated. The complaint before the Credentials Committee was based on asserted violations of rules A-1, A-2, C-4 and C-6. These rules deal with the requirements that State Democratic Parties make the delegate selection process an open and fair one.

After a lengthy hearing, the Hearing Examiner selected by the Credentials Committee to hear the complaint issued findings of fact. His decision upheld the challengers' contention with respect to each of the guidelines in question. The Credentials Committee voted to accept the Hearing Examiner's report in total; to unseat the challenged delegates; and to seat an alternative slate of delegates.

This suit was thereafter instituted as a class action in the District Court, on behalf of the 50 challenged delegates and the voters they represent. The complaint sought to overturn the decision of the Credentials Committee on

the grounds that its action violated the constitutional rights of the 50 delegates.[5] The challenged delegates sought a declaration that each of the guidelines, as applied to them, was unconstitutional; and an injunction reinstating them as delegates to the 1972 convention.

After a hearing, the District Court denied the request for an injunction. In so ordering, the court found that the action of the Credentials Committee with respect to guidelines A-5 and C-6 did not pose any deprivation of constitutional rights. In addition, the Court readopted its findings of June 19, which had been vacated by this court on the ground of prematurity. See note 5 *supra*. Those findings held certain of the guidelines unconstitutional.

The Illinois delegation recognizes that in order to prevail, it must sustain its assertion that each of the grounds relied on by the Hearing Examiner, and in turn by the Credentials Committee, is unconstitutional. They have not met that burden. The District Court's determination that there exists a valid basis for the action of the Cre-

[5] The plaintiffs in this case had filed a suit in the District Court, seeking essentially the same relief as sought here, prior to the ruling of the Hearing Examiner. The District Court issued an order at that time which reached the merits of the constitutional claims raised in the complaint. On appeal, this court vacated the District Court's order on the ground that because no action adverse to plaintiffs had yet been taken, the suit was premature. The case now under consideration was consolidated by the District Court with the prior suit. Since the Credentials Committee has already acted, the controversy is now ripe for adjudication.

dentials Committee, insofar as it is based on Guideline C-6, is hereby affirmed.

Guideline C-6 states:

> C-6 Slate-making
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> In mandating a full and meaningful opportunity to participate in the delegate selection process, the 1968 Convention meant to prohibit any practice in the process of selection which made it difficult for Democrats to participate. Since the process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected, the Commission requires State Parties to extend to the nominating process all guarantees of full and meaningful opportunity to participate in the delegate selection process. When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose.
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> Furthermore, whenever slates are presented to caucuses, meetings, conventions, committees, or to voters in a primary, the Commission requires State Parties to adopt procedures which assure that:
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> 1. the bodies making up the slates have been elected, assembled, or appointed for the slate-making task with adequate public notice that they would perform such task;
> 2. those persons making up each slate have adopted procedures that will facilitate widespread participation in the slate-making process, with the proviso that any slate presented in the name of a presidential candidate in a primary State be assembled with due consultation with the presidential candidate or his representative.

3. adequate procedural safeguards are provided to assure that the right to challenge the presented slate is more than perfunctory and places no undue burden on the challengers.

When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose.

The process by which candidates for an office are endorsed can be just as integral a part of the ultimate election as is the election itself. The Supreme Court established that principle in Terry v. Adams, 345 U.S. 461 (1953), and it applies as well with respect to the process for choosing convention delegates. The Democratic National Party determined to make participation in the nomination process as democratic as possible. This exercise of the Party's power over the qualifications of the delegates to its convention was pursuant to a reasonable regulation calculated to achieve a permissible, indeed laudable, end. The action of the Credentials Committee was taken on the basis of a clear and constitutional rule which avoided the problem of vagueness found in the application of Guideline B-6 or the mandate of the 1968 convention to ban 'winner take all' primaries. Moreover, this rule had been announced—and understood—as applicable to the selection of delegates prior to the election process.

The challenged delegates claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the

challenged delegation. No violation of Illinois law is at issue here. The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent. The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself.

Enforcement of Guideline C-6 is thus a permissible exercise of the power of the Credentials Committee. Since the action of the District Court was properly based on its conclusion that no constitutional violation existed in the application of Guideline C-6 to the 59 Illinois delegates, Judges Bazelon and Fahy do not find it necessary to the disposition of this appeal to reach the issues the District Court decided in the other parts of its order, and they express no opinion on the validity of the reasoning or conclusions of the District Court.[6]

[6] Although Judges Bazelon and Fahy do not reach the question of the constitutionality of the action of the Credentials Committee based on rules A-1 and A-2, they find nothing in the order of the District Court which declares those rules unconstitutional. Paragraph 3 of the District Court's order of June 19, reissued on July 3, declares unconstitutional the use of any *quota* requirement to exclude a group of delegates. By their own terms, guidelines A-1 and A-2 do *not* requires a quota. All that they require is that in order to remedy past discrimination, State Democratic Parties take affirmative action

Judge MacKinnon would additionally reach, and affirm, that portion of Judge Hart's order finding that Guidelines A-1 and A-2 are unconstitutional insofar as they might be interpreted to require imposition of quotas on the composition of any delegation. The Illinois challengers have sought to justify these two Guidelines by arguing that they do not impose rigid quotas based on race, sex, age or national origin, but rather that they constitute an exhortation to the State Parties to take strong affirmative action to ensure that these segments of the population are represented in the Presidential nominating process in roughly the same proportions as they exist in the general population. Judge MacKinnon believes this argument somewhat disingenuous, and would conclude that to the extent that the guidelines obviously do create some required preferences for such groups they do represent the imposition of quotas which are a denial of equal protection of the laws to those groups that are fenced out. Believing that quotas are thus to some extent being imposed by the Credentials Committee pursuant to guidelines A-1 and A-2, Judge MacKinnon would distinguish the judicial precedents upholding such affirmative action programs in the area of employment. *See, e.g., Carter* v. *Gallager*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 40 U.S.L.W. 3557 (U.S. May 22, 1972); *United States*

(footnote continued)

to increase the participation of certain groups in Party affairs. Paragraph 4 of the District Court's order expressly approved such a requirement, and the use of an exclusion sanction to enforce it. Judges Bazelon and Fahy read Judge Hart's order to say only that guidelines A-1 and A-2 could be unconstitutional as *applied*, if they were used to justify the imposition of a quota.

v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.) *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The Democratic National Party relies heavily on *Carter*, in which Judge Gibson, writing for the Eighth Circuit sitting en banc, states:

> The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation on one constitutional guarantee by the outright denial of another.

452 F.2d at 330. Yet this acknowledged violation of the Equal Protection Clause was justified on the basis that it was necessary to provide a remedy for practices which operated to deny the constitutional right to be free from racial discrimination in employment. Judge MacKinnon considers that the Illinois election laws do not operate in a manner which deprives any individual of any race, sex, age, etc. from the right to participate in any Illinois election as a candidate or elector for any office. Absent any violation of constitutional rights in the conduct of elections in Illinois, he would find no justification for an affirmative action program here and would accordingly conclude that Guidelines A-1 and A-2 unconstitutionally deny equal protection without the necessity for doing so to protect other constitutional rights.

The Illinois Counter-Claim

The National Democratic Party appeals from the denial of their counterclaim against the Illinois plaintiffs seek-

ing declaratory and injunctive relief barring further prosecution of an Illinois state court action previously brought by the plaintiffs against the Illinois challengers. In that state proceeding the plaintiffs sought a declaration that they were the duly elected delegates to the 1972 National Convention, and an injunction against the challengers from taking any action that would interfere with the plaintiffs' functioning as delegates to the Convention. Judge Hart based his denial of the counterclaim on the grounds that the question of the legality of the slate certified by the Credentials Committee in lieu of the plaintiffs was not before him, and that there was no justiciable issue presented in this action concerning the eligibility of the members of that slate to represent the Illinois districts in question.

In so ruling Judge Hart seems to have focused solely on the state law claims which apparently are the basis of the state proceeding, and which were not before the District Court here. However, in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law. Proper resolution of the ultimate issues raised in the state proceeding would thus require consideration of both sets of requirements, and the interests of judicial efficiency, coupled with the rapidly expiring time remaining before the start of the Convention, call for resolution of those issues in one forum. At present the Illinois plaintiff and the challengers are both parties to the state liti-

gation and to these proceedings; thus their respective interests could be resolved in either forum and the ordinary principles of federalism and comity might be thought to require us to deny an injunction against the state proceeding. *Younger* v. *Harris*, 401 U.S. 37 (1971), and companion cases. But this counterclaim is brought by the National Party, whose interest in the ultimate resolution of the questioned qualifications of the Illinois delegation is clear, yet who is not a party in the state litigation. Their presence in this forum, brought here as defendants in a suit initiated by the same class of plaintiffs who are the plaintiffs in the state proceeding provides us with justification for enjoining further prosecution of that state court proceeding.

In taking this step, we must first be careful to ensure that the requirements for such an injunction are fully met. Two types of requirements must be met; the express language of 28 U.S.C. §2283, and the doctrines of equity, comity and federalism as recently articulated in *Younger, supra,* and its companion cases. Section 2283 provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

We find that either the first or third exception to §2283 authorizes us to enjoin further prosecution by the plaintiffs of their Illinois state suit.

The National Party alleges in its Counterclaim that its First Amendment right of association would be in-

fringed by a state court declaration contradictory to the decision of the Credentials Committee to seat a delegation consisting of delegates other than plaintiffs. The Party thus grounds the jurisdiction of its Counterclaim on 42 U.S.C. §1983, which authorizes a "suit in equity" to redress the deprivation "of any rights, privileges and immunities secured by the Constitution." In *Mitchum* v. *Foster,* 40 U.S. L.W. 4737 (U.S. June 19, 1972), the Supreme Court expressly held that an action brought under §1983 is one "expressly authorized by Act of Congress" and is thus within the first exception to §2283's prohibition against enjoining state proceedings.

We also consider that an injunction is necessary to protect and effectuate our judgment upholding the action of the Credentials Committee here. The Resolution of the Committee which we have here approved provides that the 59 plaintiffs in this suit are not to be seated as the delegates to the Convention from their districts in Illinois. It also provides that 59 other persons shall be seated as the delegates from those districts. In order to protect our judgment approving this Resolution, it is necessary to enjoin plaintiffs from taking any action in any other court that would impair the effectiveness and the integrity of the judgments of this Court.

Finally, we must consider whether the fundamental policy against federal interference in state litigation so strongly reaffirmed in *Younger,* with respect to criminal prosecutions, 401 U.S. at 46, bars our taking this action in the civil suit presently before us. We conclude that it does not. In *Mitchum, supra,* the Court described its holding in *Younger* as follows:

> [t]he Court clearly left room for federal injunctive intervention in a pending state court prosecution *in certain exceptional circumstances*—where irreparable injury is "both great and immediate," 401 U.S., at 46, . . . or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." 401 U.S., at 54. In the companion case of *Perez* v. *Ledesma,* 401 U.S. 82, the Court said that ". . . perhaps *in other extraordinary circumstances* where irreparable injury can be shown . . . federal injunctive relief against pending state prosecutions [is] appropriate." 401 U.S., at 85.

40 U.S.L.W. at 4738. (emphasis added).

Irreparable injury, "both great and immediate," are clearly shown here. If plaintiffs were successful in their state proceedings one likely result would be that no delegates from the challenged Illinois districts could be seated at the Convention. Such a result would not just deprive the National Party of the participation of those persons whom it has selected to fill those delegate seats, more fundamentally it would deprive all Democrats residing in those districts of any voice or representation in the process by which their party's candidate for the Presidency is selected. The immediacy of this injury is clear—the Convention begins in five days—and after that the injury is wholly irreparable.

We also consider that the unique situation presented by these two cases, all interested parties represented in the federal forum and a critical party missing from the state forum; this court's familiarity with the complex of issues involved—bred and nurtured in the consideration of both the California and Illinois challenges; both actions commenced in the separate forums by the same class of

plaintiffs; and the rapidly expiring time within which any judicial action is possible—amply provide the extraordinary and unusual circumstances that call for equitable relief. For the foregoing reasons we reverse the District Court's denial of the National Party's Counterclaim, and we accordingly enjoin the Illinois plaintiffs from taking action in any other Court that would impair the effectiveness and the integrity of the judgments of this Court.

IV.

Accordingly, the motion for summary reversal in No. 72-1629 is denied; the motions for summary reversal in Nos. 72-1630, 72-1631 and 72-1628 are granted and the cases are remanded to the district court for the entry of orders consistent with this opinion.

So ordered.

Fahy, *Senior Circuit Judge,* concurring in Nos. 72-1629, 72-1630, and 72-1631, the Illinois cases, dissenting in No. 72-1628, the California case.

The decision of the Credentials Committee in the California case I think was within the competence of the Committee to make, subject to the will of the Convention. The contention to the contrary is that the action of the Committee deprived the plaintiffs-appellants of "life, liberty or property, without due process of law." The Committee action, however, would require the California delegation to the Convention to reflect the apparent choice in the primary of the several candidates for whom the people voted, in proportion to the votes the respective candidates received. Such a decision cannot in and of itself

be described as a denial of due process of law. Moreover, it is quite consistent with the ongoing reform movement within the Party. It is said, however, that this otherwise quite acceptable result was a deprivation of due process of law, not because the California plan of "winner-take-all" must be accepted because the statute so provides,[1] but principally because (1) there was no objection made to the statute by any candidate prior to the primary, (2) there was also evidence of its acceptance by Party officials, (3) the California legislature had recently reaffirmed the plan.[2] When the matter came before the Credentials Committee, however, that agency of the Party interpreted the reform resolution of the 1968 Convention, together with the guide-lines thereafter adopted by the National Committee, to furnish a basis for the decision it rendered apportioning the delegates. Whether or not one agrees with this interpretation, I find in it and in its result no violation of the particular provision of the Constitution upon which appellants rely, or of any other of the provisions of the Constitution. Whatever the political motivations of members of the Committee the action taken is not thereby rendered unconstitutional. I add that in my opinion the action of the Committee should not be overturned

[1] Our decision in No. 72-1629 supports the action of the Credentials Committee though the Committee did not feel bound by the Illinois statute.

[2] The extent of any detrimental reliance by the affected candidates upon the California plan seems to me wholly speculative. Moreover, no one acting in a non-partisan capacity on behalf of the voters in the California primary has sought participation in this litigation to contest the action of the Credentials Committee.

merely because it operated retroactively, as any decision of a court or agency usually does. *Cf. Chenery* v. *S.E.C.*, 332 U.S. 194 (1947). I accordingly would leave the matter for resolution by the Party, soon to meet in Convention, without the court intervening by decree to set aside the action of the Committee.

It does not appear to me that the fairness of the process of electing the President of the United States is endangered either by the action of the Credentials Committee in apportioning the delegation according to the votes for each candidate in the primary, or by the Committee's interpretation of its authority, stemming primarily from the 1968 Convention, considered with the guide-lines subsequently promulgated by the McGovern-Fraser Commission, and approved by the National Committee. These guide-lines, largely relied upon by the court, provide as follows with respect to their own status:

> "Because the Commission was created by virtue of actions taken at the 1968 Convention, we believe our legal responsibility extends to that body and that body alone. We view ourselves as the agent of that Convention on all matters related to delegate selection. Unless the 1972 Convention chooses to review any steps the Commission has taken, we regard our Guidelines for delegate selection as binding on the states."

Thus, as it seems to me, the guide-lines, in their reference to the 1972 Convention, afford greater latitude to the Credentials Committee in making its recommendation to the Convention than the court permits.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1629
THOMAS E. KEANE, ET AL, APPELLANTS,
v.
NATIONAL DEMOCRATIC PARTY, ET AL.

No. 72-1630
THOMAS E. KEANE
v.
NATIONAL DEMOCRATIC PARTY, ET AL., APPELLANTS

No. 72-1631
THOMAS E. KEANE, ET AL.
v.
NATIONAL DEMOCRATIC PARTY, ET AL.,
WILLIAM COUSINS, ET AL., APPELLANTS

On Remand from the Supreme Court of the United States

Decided February 16, 1973

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge* and MACKINNON, *Circuit Judge*.

Opinion Per Curiam.

Opinion concurring in part and dissenting in part by Circuit Judge MacKinnon at p. 3.

PER CURIAM: On October 10, 1972, the Supreme Court vacated the judgment of this court in this cause and remanded the cause to this court to determine whether the case has become moot. Accordingly, the case is before us now (1) on the appeal of Keane et al., plaintiffs in the District Court, from the judgment of that court denying the declaratory and injunctive relief plaintiffs requested and dismissing their complaint, and (2) on the appeals of the National Democratic Party et al., defendants, and of intervenor-defendants, Cousins et al., from the judgment of the District Court denying the declaratory and injunctive relief sought in the counter-complaint filed by the defendants.

In the period intervening since the action of the District Court the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation whose right thereto was contested by plaintiffs, Keane et al., in the District Court. Insofar as the complaint involved such right of representation the case thus became and is now moot.

Insofar as the complaint involves questions as to rights of the competing delegates to post-Convention representation in National Democratic Party matters, we think the case is not moot. This court being advised, however, that these questions are pending before the Credentials Committee of the National Committee of the Party, we find no equitable basis upon which the District Court or this court should now intervene by declaratory or injunctive relief.

Insofar as the case involves the request for injunctive or other relief sought by intervenor-defendants, Cousins

et al., or previously though no longer sought by the National Democratic Party et al., defendants, we are also of the opinion that no exceptional circumstances appear to justify now the relief requested.

By reason of the foregoing, the judgment of the District Court dismissing the complaint and counter-complaint is affirmed.

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: As I view the complaint it sought only the seating of the Keane delegates at the Democratic National Convention and that issue has been determined by the Supreme Court staying our judgment and by the subsequent action of the Democratic National Committee seating the anti-Keane delegation. I do not consider that this lawsuit involves questions as to the collateral consequences of that action or as to the actions taken by the Democratic Party subsequent to the adjournment of the convention.

However, I do not consider that the action is moot insofar as it seeks a declaration that "the Rules of the Democratic National Party violate the First, Fourteenth and Fifteenth Amendments to the U.S. Constitution and the Civil Rights Act of 1871." Complaint of Plaintiff at p. 13. In our earlier opinion, *Brown* v. *O'Brien*, —— U.S.App. D.C. ——, 469 F.2d 563 (1972), we passed upon such issues to the extent necessary and upheld the constitutionality of Guideline C-6 sufficiently to decide that petitioners Keane, et al. were not entitled to be seated at the convention. While the Supreme Court thereafter vacated our judgment, *Keane* v. *Nat. Democratic Party*, 41 U.S.L.W.

3182 (U.S. Oct. 10, 1972), the issue as to the constitutional validity of Guideline C-6 continues, is almost certain to recur and the timing of its likely reoccurrence close to our national presidential elections would make it evasive of review within the time available. *Moore* v. *Ogilvie,* 394 U.S. 814 (1969). I would therefore reinstate our judgment insofar as it upholds the constitutional validity of Guideline C-6.

APPENDIX F.

Paul T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated, Plaintiffs,

v.

William COUSINS et al., Defendants.

No. 72 C 1001.
United States District Court,
N. D. Illinois, E. D.
May 17, 1972.

MEMORANDUM OPINION

WILL, District Judge.

Plaintiff originally brought this action in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, seeking 1) to have himself and others similarly situated declared duly elected delegates and alternates to the 1972 Democratic National Convention (the "Convention") in accordance with Illinois law and therefore entitled to take their seats at the Convention; and 2) to enjoin the defendants from taking any action that would interfere with plaintiff's functioning as delegates and alternates to the Convention. Defendants removed the case to this Court pursuant to 28 U.S.C. § 1446, alleging that the case was properly removable to a Federal Court under 28 U.S.C. §§ 1441 and 1443. Plaintiff then

moved to have the case remanded back to the State Court pursuant to 28 U.S.C. § 1447(c) on the ground that this Court lacks jurisdiction over the subject matter of the dispute. Inasmuch as we find that there is no basis for federal jurisdiction over the subject matter of this dispute, we grant plaintiff's motion and remand the case to the Circuit Court of Cook County.

Before proceeding with an examination of the possible jurisdictional bases for this cause of action, a more detailed statement of the relevant facts is necessary. In a primary election held in Illinois on March 21, 1972, plaintiff and the class he purports to represent (the "uncommitted delegation") were elected as "uncommitted" delegates and alternates to the Convention. That they were elected in accordance with the provisions of the Illinois Election Code relating to the selection of delegates to a national convention of a political party, Ill.Rev.Stat. ch. 46 §§ 7-14 and 7-14.1, is not disputed. On March 31, the defendants filed with the Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention (the "Credentials Committee") a "Notice of Intent to Challenge" the seating of the members of the plaintiff class as delegates and alternates to the Convention.

Thereafter, the defendants additionally filed a "Statement of Grounds of Challenge Against the Proposed 'Uncommitted' Delegates to the 1972 Democratic National Convention from the Districts Encompassing the City of Chicago" in which they alleged that the members of the plaintiff class were selected in violation of the Rules adopted by the Democratic National Committee and incorporated into the Call of the 1972 Democratic National

Convention which set forth standards and qualifications to be met in the selection of delegates from each of the states to the Convention (the so-called "McGovern Rules"). Specifically, the defendants contend that "[b]lacks, Latin Americans, women and young people are grossly underrepresented on the Proposed Delegation and in all Chicago party affairs" and that "the Proposed Delegation was slated, endorsed, and supported by the party organization without open slate-making procedures, without published rules and by party officials chosen prior to 1972."

On April 19, plaintiff filed a civil action in the Circuit Court of Cook County, County Department, Chancery Division, asking the court: 1) to declare plaintiff a proper class representative of the "uncommitted" delegates and alternates to the Convention; (2) to declare all members of the plaintiff class to be duly elected delegates and alternates in accordance with Illinois law and therefore entitled to take their seats as such at the Convention; 3) to enjoin the defendants from taking any action which would interfere with members of the plaintiff class functioning as delegates and alternates (e. g., pursuing their challenge with the Credentials Committee); and 4) to grant any other appropriate relief. On April 20, defendants filed a petition for removal of that action to this Court pursuant to 28 U.S.C. § 1446. On April 21, plaintiff filed a motion for preliminary injunction in the Circuit Court of Cook County which became dormant due to the removal of the case to this Court.

On April 24, plaintiff moved to have the case remanded to the state court pursuant to 28 U.S.C. § 1447 on the

ground that this Court lacks judisdiction over the case. In addition, plaintiff moved for an order temporarily restraining defendants from proceeding with their challenge to the Credentials Committee. Both motions were taken under advisement pending a determination whether we have jurisdiction. On May 2, plaintiff submitted a motion for a preliminary injunction enjoining defendants from proceeding before the Credentials Committee.

After discussion with plaintiff's counsel in open court, the Court ruled on the question of enjoining defendants pending a determination of the jurisdictional question. The motion for a preliminary injunction and the motion for a temporary restraining order were denied on May 2, inasmuch as there had been no showing of immediate and irreparable harm as required by Rule 65(b), Fed.R.Civ.P., and because the underlying claim for relief in the case—an order enjoining the defendants from exercising their First Amendment rights within procedures set up by a national political party—raises substantial constitutional questions which ought not be resolved on a motion for a temporary restraining order or preliminary injunction but only after a full hearing on the merits.

Given that background of the case, it must now be determined whether this Court has jurisdiction over the subject matter of the dispute. In their petition for remand, defendants have asserted two statutory bases for removal jurisdiction—28 U.S.C. §§ 1441 and 1443—each of which will be discussed separately.

I. SECTION 1441

In essence, section 1441 provides that removal is permissible if the federal court to which the action is being

removed would have had jurisdiction over the subject matter and parties if the action had originally been brought in that federal court. Inasmuch as the parties to the instant action are all citizens of Illinois, in order for removal to be proper under § 1441, the action must have been maintainable, if brought here originally, under federal question jurisdiction, 28 U.S.C. § 1331, i. e., the matter in controversy must exceed $10,000 in value and arise under the Constitution, laws, or treaties of the United States.

The defendants have proffered several bases for federal question jurisdiction, asserting that the controversy arises under the Constitution of the United States—Article II § 1, 1st Amendment, 14th Amendment, and 15th Amendment. It is important to note initially that any basis for federal jurisdiction must stem solely from the allegations of the complaint. Great Northern Ry. Co. v. Galbreath Cattle Co., 271 U.S. 99, 46 S.Ct. 439, 70 L.Ed. 854 (1926); Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); Crow v. Wyoming Timber Products Co., 424 F.2d 93 (10th Cir. 1970). See also, Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). The defendants' primary argument is that, since the case involves a controversy connected with the election of the President of the United States, albeit several steps removed from the formal selection of the President by the Electoral College pursuant to Article II § 1, as amended, it arises under the Constitution. They argue that the request in the complaint that the court declare that the uncommitted delegation is entitled to sit as such at the Convention raises the question

whether the selection of this uncommitted delegation in accordance with Illinois election laws constitutes a bar to a challenge under the rules of the National Democratic Party and that this question can only be decided under the Federal Constitution.

No case has been cited in support of this argument apparently because it is a question of first impression. We hold that the eligibility of delegates to a national party convention is not within the scope of Article II § 1, as amended by the 12th Amendment. To conclude otherwise would be to open the federal courts to a wide variety of controversies, for, under the same logic, almost any controversy can somehow be related to a general provision in the Constitution. The mere fact that this controversy centers around a preliminary process pertaining to the selection of the President without more does not confer jurisdiction over that controversy upon the federal courts.

This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party or the convention. This is clearly a question of political party policy which is not justiciable, if at all, unless and until the Credentials Committee acts and then only if its actions violate fundamental constitutional rights.

The state election laws are applicable only to the extent that they regulate the manner of selection of delegates and are not applicable to their qualifications or eligibility to serve.

The several other grounds asserted by the defendants cannot support federal jurisdiction in the instant case since they can arise in the lawsuit only by way of defense and not from the complaint. *See,* Great Northern Ry. Co. v. Galbreath Cattle Co., and related cases cited *supra.* Undoubtedly, the issue of whether an order can be entered enjoining the defendants from pursuing what is seemingly a legitimate challenge to the Illinois delegation before the Credentials Committee without clearly violating defendants' 1st Amendment rights, as protected through the due process clause of the 14th Amendment against state interference, involves a federal question. Given the complaint in this case, however, that issue can only be raised by way of defense. Likewise, the underlying issues of whether certain allegedly underrepresented classes of people are being deprived of the equal protection of the laws and of protected voting rights can only be raised by way of defense.

We have considered other possible sources of federal jurisdiction and found them also lacking. First, the question of the relative supremacy of the rules of a national political party vis-a-vis state law, which was alluded to in defendants' memorandum in support of its petition for removal, cannot support federal jurisdiction in the instant case. An alleged conflict between state law and the rules of a national political party is not tantamount to a conflict between state law and federal law. To hold that the complaint in this case necessarily involves the Supremacy

clause of the Constitution, i. e., Article VI, would require a holding that the rules adopted by a political party are the equivalent of statutes passed by the Congress. Again, this is not to say that state law predominates over national party rules where they conflict. On the contrary, any attempt by an individual state to control a national convention of a party will necessarily fail due to the limits of its own jurisdiction.

The Texas White Primary Cases—Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); Teryr v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953)—all involved federal courts asserting federal question jurisdiction over the state primary elections of local political parties. However, the complaints in those cases alleged racial discrimination in violation of the 14th and 15th Amendments which provided the federal jurisdiction. The Reapportionment cases, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) together with its predecessors and progeny, all involved allegations in the complaints of denials of equal protection or due process. No such allegations as in these two groups of cases are present in the instant complaint. Nor are there federal statutes which even tangentially could be applicable to the instant fact pattern. In addition, neither of the recent constitutional amendments forbidding the imposition of a poll tax and providing for the 18 year old vote, both of which are applicable to primary elections, arise in this case by virtue of the complaint.

Accordingly, we find that § 1441 affords no basis for federal jurisdiction over the instant case for purposes of removal.

II. SECTION 1443

There are two possible bases for removal under this section.

1. *Subsection 1443(1).* This provision allows for removal of any civil or criminal action "against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens. . . ." This has been construed to mean that removal is allowed under this subsection only when it can be clearly predicted by operation of a pervasive and explicit law or pattern that federal rights will inevitably be denied by the very act of going to trial in the state court. Greenwood v. Peacock, 384 U.S. 808, 824, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966). Inasmuch as there has been no allegation that the defendants cannot raise their constitutional defenses and claims in the state court, and since it is clear that no constitutional deprivation will arise by merely defending the state action, removal is not proper under this subsection.

2. *Subsection 1443(2).* This provision allows for removal of any civil or criminal action "for any act under color of authority derived from any law providing for equal rights. . . ." In order for removal to be proper under this subsection, the defendants must have done some act about which they are about to be sued, that act must have been under color of authority of any federal law providing for equal rights, and the defendants must have been federal officers performing their duties under the above mentioned law. Greenwood v. Peacock, *supra.* In the instant case, there is no question that the defendants are being sued for an act which they have done and currently are

doing—the presentation of a challenge to the uncommitted delegation to the Credentials Committee. With respect to the second requirement, defendants argue that it has been fulfilled since they are enforcing the McGovern Rules which do indeed deal with equal rights by providing for a more equal representation of the citizenry within the Democratic Party. Clearly, however, the McGovern Rules are not federal law, as has been discussed above. Moreover, the defendants are not federal officers. Their argument that by enforcing the McGovern Rules they are performing the essential duties of federal officers and therefore *are* federal officers hinges on the characterization of those rules as federal law. Inasmuch as such a characterization cannot be made, the defendants cannot be characterized as federal officers. Since the defendants are not federal officers enforcing federal law, removal is not proper under § 1443(2).

In brief summary, plaintiff's motion to remand the case to the Circuit Court of Cook County must be granted since there is no jurisdictional basis for this federal court to hear it. However, to say that this controversy in its present posture cannot be litigated and resolved in the federal court does not, as previously indicated, imply that it must, will, or can properly be resolved in the state court. That court faces serious jurisdictional difficulties as well and, even if those initial barriers are overcome, it is difficult to imagine any thoughtful court granting the type of relief requested in the instant case.

An appropriate order consistent with the foregoing will enter.

APPENDIX G.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
June 30, 1972

Honorable WALTER J. CUMMINGS, *Circuit Judge*
Honorable WILBUR F. PELL, *Circuit Judge*
Honorable JOHN PAUL STEVENS, *Circuit Judge*

NO. 72-1455

WILLIAM COUSINS, PATTY CROWLEY, BARBARA HILLMAN, REV. JESSE JACKSON, CATHY KENNEDY, MARY LEE LEAHY, ANNA LANGFORD, ALBERT RABY, WILLIAM SINGER and MIGUEL VELAZQUEZ,

Plaintiffs-Appellees,

v.

PAUL T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
No. 72 C 1108,
Frank J. McGarr, Judge

MEMORANDUM

PER CURIAM.

At the conclusion of oral argument on June 29, 1972, this court entered an order vacating the injunction issued by the district court on June 9, 1972. This memorandum will briefly summarize the proceedings and the basis for our conclusion that the injunction had been improvidently entered.

I.

This litigation was commenced on May 3, 1972, when plaintiffs, to whom we will sometimes refer as "Cousins, et al.," filed their complaint in the United States District Court for the Northern District of Illinois. The material facts are as follows.

On April 18, 1972, the Secretary of State of the State of Illinois proclaimed that defendant Wigoda and certain other persons (hereinafter sometimes referred to as "Wigoda, et al.") had been duly elected as delegates to the 1972 Democratic Convention. The complaint alleged that Wigoda represented a class of delegates and alternates from eight specific Illinois congressional districts.

Cousins, et al., are residents of Cook County, who on March 31, 1972, filed with the Credentials Committee of the Convention a notice of intent to challenge the seating of Wigoda, et al., at the Convention. On April 6, 1972, plaintiffs filed a statement of grounds for the challenge alleging, in substance, that defendant Wigoda and members of his group had been selected as delegates in violation of the Rules of the National Democratic Party. Neither the challenge nor the complaint before us charged that there had been any violation of the Illinois Election Code or that any question as to the eligibility of Wigoda, et al., had been raised before the election was conducted.

On April 19, 1972, the day after the Secretary of State certified the results of the Illinois election, defendant Wigoda filed a complaint for injunction and other relief and a motion for preliminary injunction in the Circuit Court of Cook County. That complaint (hereinafter "the state complaint") alleged in detail that Wigoda, et al., had complied with the various provisions of the Illinois Election Code pertaining to the election of delegates to the Convention, described the filing of the challenges and statement of grounds with the Credentials Committee of the Convention, and alleged that the challenge, if successful, would interfere with Wigoda's right to serve as a delegate and undermine the results of an election lawfully conducted in compliance with Illinois law. The state complaint prayed for a judgment declaring that Wigoda, et al., had been duly elected and were therefore entitled to be seated at the Convention and to fully participate therein. The state complaint further prayed: "That defendants be enjoined from taking any action, the purpose, intent or effect of which would be to interfere with or impede the functioning of plaintiff and the delegates and alternates in their duly elected office." After filing the state complaint on April 19, Wigoda's counsel notified Cousins, et al., that a motion for a preliminary injunction would be presented before Judge O'Brien on April 21 at 10:00 o'clock A.M.

On April 20 the Cousins group removed the state litigation to the federal court. Wigoda then moved in the federal court for an order remanding the case to the Circuit Court of Cook County. That motion was taken under advisement and finally granted on May 18, 1972. However, on that date the district judge stayed the remand for ten days to permit review by this court. We extended

the stay in order to receive briefs from the parties; on June 7 we terminated the stay, finding that "the probability of a successful appeal is minimal."

Meanwhile, as already noted, the federal complaint was filed on May 3, 1972. In that complaint Cousins, et al., described the challenge which they had filed with the Credentials Committee of the Democratic Convention and the state complaint filed on behalf of Wigoda, et al. They further alleged that they were preparing to hold political meetings and caucuses within the City of Chicago to select persons, pursuant to the Rules of the Democratic Party, to represent Democrats from the City of Chicago at the 1972 Convention; that the state complaint was "frivolous as a matter of law," but nevertheless the threat of a circuit court injunction "discourages persons from participating in the political meetings and processes" which are being carried on for the purpose of challenging the elected delegates and selecting substitutes.

On May 25, 1972, Judge McGarr entered a temporary restraining order. He found that to the extent that the state complaint sought to prevent the Cousins group from going forward with their challenges under the Democratic Party Rules or from speaking, meeting, or preparing to seek recognition of an alternate slate of delegates, it sought an unsupportable interference with Cousins, et al.'s constitutionally protected rights, and must be construed to be on its face indicative of sufficient bad faith and harassment to warrant the intervention of the federal court.

On June 9, 1972, the court conducted a hearing on the Cousins motion for preliminary injunction. The plaintiffs

presented three witnesses: Witness Bode described the development of certain so-called "reform rules" of the Democratic National Convention. Witness Singer described the progress of the challenge before the Credentials Committee and the adverse effect of a possible injunction. Witness Barbara Hillman testified that her husband had expressed concern about her and her sister's involvement because of a possible injunction. The district court then reaffirmed the findings which it had made on May 25, 1972, in support of the temporary restraining order, and stated that the evidence heard on June 9 established that the pendency of a prayer for injunctive relief in the state complaint "does have something of a chilling effect on the caucusing and other described activities of the plaintiffs in connection with their challenge to the elected delegates." He found that to the extent that the state complaint sought injunctive relief it was brought "in bad faith," although he expressly disclaimed any intent to accuse counsel for Wigoda of improper conduct. The conclusion was predicated on the court's opinion that the state complaint's request for injunctive relief was "unsupportable" and had "no likelihood of success."

In his injunction order the district judge expressly allowed Wigoda, et al., to pursue that aspect of the state case requesting a declaratory judgment, but the court restrained Wigoda from interfering with the challenge or the selection of an alternative set of delegates and alternates.

It is that order from which Wigoda, et al., have appealed and which we have vacated.

II.

Although a federal court has power to grant an injunction to stay litigation in a state court, *Mitchum* v. *Foster*, —— U.S. ——, 40 U.S.L.W. 4737 (June 19, 1972), "principles of equity, comity, and federalism" dictate restraint in the responsible exercise of that power. *Id.* at 4742. The underlying policy was described by Mr. Justice Black in *Younger* v. *Harris*, as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. 37, 44.

Although those considerations may be less compelling when the state litigation is civil rather than criminal, see *Younger* v. *Harris*, 401 U.S. at 55, note 2 (Mr. Justice Stewart concurring), they require special respect for the state judicial process if federal jurisdiction is not invoked until after state litigation is commenced. Cases such as *Wisconsin* v. *Constantineau*, 400 U.S. 433, in which no state litigation had been commenced, or was even threatened, did not involve the same potential conflict between courts of overlapping jurisdiction.

There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not yet disputed those allegations, but retains the right to do so. Moreover, assuming vacancies in the slate of delegates may

occur, by death, resignation, or by the successful prosecution of one or more challenges before the Credentials Committee of the National Convention, Illinois law may control, or may affect, the manner of selecting substitutes or alternates.[1] Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues.[2]

Cousins, et al., argue that the underlying issue is what forum—the Illinois courts or the National Convention—should decide the merits of (a) their challenge, and (b) their right to serve as substitute delegates. Neither side suggests, however, that the issues should be resolved in a federal forum, or at least in a federal district court which does not have jurisdiction of the Convention or its Creden-

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[1] 46 Smith Hurd Ill. Stat. Anno. § 7-1 provides:

> "Except as herein otherwise provided, the nomination of all candidates . . . for the election of . . . delegates and alternate delegates to National nominating conventions by all political parties . . . shall be made in the manner provided in this Article 7, *and not otherwise*." (Emphasis added.)

Cousins, et al., argue that the Code does not provide the exclusive method of selecting delegates to represent the State of Illinois at the National Democratic Convention, but they have not identified for us the legal basis for an alternative method of selection.

[2] For example, an exhibit attached to plaintiffs' complaint sets forth certain Democratic Party guidelines which state, in part, on the subject of slate-making:

> *"When State law controls*, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose." (Emphasis added.)

tials Committee.[3] It is perfectly clear, therefore, that the entire controversy cannot be resolved in the United States District Court for the Northern District of Illinois.

To what extent the courts of Illinois must defer to the Credentials Committee, and conversely to what extent the Credentials Committee should defer to the law of Illinois in selecting delegates to represent that state, are matters which were not raised or argued in the court below. In our view these basic and underlying issues must be developed in an orderly fashion in either or both of the two fora which do have an appropriate part to play in resolving the dispute between the parties. Thus, when Cousins, et al., filed their complaint in the federal district court, there was pending in the courts of Illinois litigation in which state law issues were properly raised. The question presented to the district court was whether, having a due regard for the principles of comity which must govern, the relationship between federal and state tribunals, a showing of such threatened irreparable injury to federally protected rights had been made as to require the extraordinary relief of entering an injunction which would inevitably interfere with the orderly progress of pending litigation.

The showing made by Cousins, et al., was in two parts. They contend that the prayer for relief in Wigoda's state complaint was overly broad and patently frivolous. They therefore argue, first, that if the state court should grant

[3] Even if the final determination is to be made by the National Convention, it does not necessarily follow that the decision of State law issues by an Illinois tribunal will impair the work of the Convention. *Cf., Roudebush* v. *Hartke,* 405 U.S. 15, 26.

the complete relief for which Wigoda prayed in his state complaint, their vital First Amendment rights would be abridged; and second, that the mere pendency of a complaint containing such a broad prayer for relief had an immediate "chilling effect" on the exercise of those rights. The district court relied primarily on the first contention, but also, after hearing evidence, found that the complaint itself "does have something of a chilling effect." We consider the two bases for federal intervention in state litigation separately.

First: Plaintiffs have not alleged or attempted to prove that they will not receive a fair trial in the courts of Illinois, or that the state judicial system will not fully honor and protect their constitutional rights. If, therefore, they are correct in construing the prayer for relief as frivolous and overly broad, we cannot presume that such relief would be granted by an Illinois chancellor, or if granted would be sustained on direct review. Unless some showing is made to the contrary, we must assume that an Illinois court would properly determine the merits of any federal issue properly presented to it. The mere possibility, unsupported by allegation or evidence, that a state judge might make a flagrantly erroneous ruling on a federal issue is an insufficient basis for federal intervention in the orderly progress of state litigation.

On the other hand, if the prayer for injunctive relief in the state complaint is not entirely frivolous, and there is some area in which state interests require vindication, the ability of the state tribunal to appraise the issues fairly and to fashion the appropriate relief must certainly be impaired by an outstanding federal order which broadly pro-

vides that a state chancellor may go thus far and no farther. The validity of constitutional contentions often turns on a precise delineation of the relevant facts and applicable provisions of state law. Inevitably, the district court's partial stay of the proceedings in the state court will impair the orderly definition and decision of the relevant issues.

We recognize that the time available for appellate review of any order which may be entered by an Illinois chancellor is now extremely limited, since the Convention will soon convene. More time would have been available if Cousins, et al., had mounted their attack before the Illinois election was held in March, or if they had met the state complaint when it was filed on April 18, 1972. The delay in the proceedings since that date cannot be charged to Wigoda, et al. But even if there had been no delay, our responsibility to approve or disapprove of the injunctive order entered by the court below must be based on the record made in that court before the order was entered.

Thus, assuming without deciding that the state complaint contains a frivolous and overly broad prayer for relief which, if granted *in haec verba,* would impair the First Amendment rights of Cousins, et al., we hold that the mere existence of such a possibility does not justify a federal court's entry of an order effectively excising that prayer from the state complaint. The partial stay of the state proceeding cannot be supported by mere speculation that an Illinois chancellor might commit flagrant error. The principles of comity and federalism which the Supreme Court has repeatedly emphasized demand a higher respect for the state judiciary.

Second: Cousins et al., argue that even if the Illinois courts will not grant overly broad relief, the mere pendency of a frivolous claim evidences "bad faith," "harassment," and has a "chilling effect" on the exercise of their First Amendment rights. We are unpersuaded by this argument.

The district court did not stay the entire state proceeding. He assumed, as do we, that the entire proceeding was not initiated in bad faith and is not frivolous. The objection is to only a portion of the prayer for relief. Assuming that such portion is frivolous and overly broad, that mere fact is insufficient to support a finding of harassment or bad faith. We need not approve the accepted practice of lawyers who routinely include excessive prayers in their pleadings to hold that such legal draftsmanship is not the kind of conduct which the Supreme Court described as "bad faith" or "harassment" in *Dombrowski* v. *Pfister,* 380 U.S. 479. The district court order clearly cannot be supported by a finding of bad faith or harassment.

Cousins, et al., argue, however, that such findings are unnecessary if they establish a "chilling effect" on their First Amendment rights and consequent irreparable injury. We find the evidence of such "chilling effect" singularly unpersuasive, and we find no evidentiary basis whatsoever for a finding of irreparable injury. The district court's tentative statement that the evidence discloses "something of a chilling effect" interpreted the record liberally in plaintiffs' favor. That ambiguous finding is, in our view, inadequate to justify federal intervention in state litigation. Moreover, the actual evidence of a chilling effect falls far short of the kind of showing made in *Dombrowski, supra.*

Plaintiffs' evidence showed no impairment whatever of their conduct of challenges to Wigoda, et al., before the Credentials Committee of the Convention; nor did it disclose any restraint on their right to assemble and to speak out in favor of the selection of an alternate slate of delegates. Most liberally construed, the evidence merely indicated some reluctance by third parties to rally to the Cousins cause because of concern that the entire effort might be aborted. But such evidence related to the persuasive impact of the arguments advanced by Cousins, et al.; it did not prove any impairment of their right to assemble or to speak out publicly. We find it anomalous that the Cousins group, which includes experienced lawyers and persons who hold themselves out as qualified to represent the State of Illinois in the robust political controversies which a National Party Convention must resolve, should contend that the mere pendency of an unanswered complaint containing an overly broad prayer for relief has a significant "chilling effect" on the exercise of their First Amendment rights. Had the district court made an unequivocal finding to that effect on the evidence that was actually presented to him, we have no doubt that such a finding would have been clearly erroneous.

Plaintiffs clearly failed to establish the kind of irreparable harm which may, in exceptional cases, justify a federal district court's entry of an order restraining the orderly prosecution of state litigation already on file.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 30, 1972

Before
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

WILLIAM COUSINS, PATTY CROWLEY, BARBARA HILLMAN, REV. JESSE JACKSON, CATHY KENNEDY, MARY LEE LEAHY, ANNA LANGFORD, ALBERT RABY, WILLIAM SINGER and MIGUEL VELAZQUEZ,

Plaintiffs-Appellees,

No. 72-1455 vs.

PAUL T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention, etc.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
(72 C 1108)

PELL, Circuit Judge, dissenting.

I respectfully dissent from the order entered by the majority of the panel from the bench on June 29, 1972, which order vacated the preliminary injunction entered by the district court.

This court has a very limited scope of review in an appeal from the granting of a preliminary injunction. The sole issue is whether the district court abused its discretion.[1]

I would hold that the district court did not abuse its discretion.

The question before us is not how we might have decided the issues before the district court as a de novo matter but we should only look at the merits to the extent necessary to determine whether the district court abused its discretion.[2]

This court is not permitted to substitute its opinion for the finding of the district court where the record furnishes a reasonable basis for the finding and action of the district court.[3]

To justify an interlocutory injunction it is not necessary that the plaintiffs' right to a final decision, after a trial, be absolutely certain or wholly without doubt.[4]

> "This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success a final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district judge; only a clear abuse of his discretion will justify appellate reversal."[5]

The balancing processes here involved are the traditional function of the equity, not appellate, court.[6]

Indeed, it has been stated that the appellate court's ruling in this particular review situation may not be invoked as res judicata nor will it become the law of the case.[7]

When the preliminary injunction has been issued to preserve the status quo, pending a determination on the merits, it is not necessary that the trial court find the certainty of a wrong, a likelihood is sufficient.[8]

Additional background matter should be observed. Until a very few days ago, uncertainty existed as whether the anti-injunction statute (28 U.S.C. §2283) barred a civil rights action (42 U.S.C. §1983) to enjoin civil proceedings in a state court. The Supreme Court held on June 19, 1972, that it did not.[9]

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[1] *Minnesota Mining & Mfg. Co.* v. *Polychrome Corp.*, 267 F.2d 772, 775 (7th Cir. 1959).

[2] *Industrial Bank of Washington* v. *Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968).

[3] *Mytinger & Casselberry, Inc.* v. *Numanna Lab Corp.*, 215 F.2d 382, 385 (7th Cir. 1954).

[4] *Mytinger, supra*, at 385.

[5] *United States Steel Corp.* v. *Fraternal Ass'n of Steelhaul.*, 431 F.2d 1046 (1970).

[6] *Locomotive Engineers* v. *M-K-T R. Co.*, 363 U.S. 528, 535 (1960).

[7] *Mesali Iron Company* v. *Reserve Mining Company*, 270 F.2d 567, 570 (8th Cir. 1959).

[8] *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 111 (7th Cir. 1970).

[9] *Mitchum* v. *Foster*, 40 L.W. 4737 (1972).

Further, it appears that the thrust of the cases sometimes categorized as the *Younger* v. *Harris*[10] decisions is that the federal courts will refrain from inhibiting action directed toward pending state criminal proceedings.

As a final matter of background, or context within which we should consider the present appeal, generally an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary or, putting it another way, discretion is abused only where no reasonable man would take the view adopted by the trial court.[11]

The ultimate merits of the law suit below revolve around the question of whether the determination of the qualifications and identity of delegates to the 1972 Democratic National Convention is governed by state law, by rules of the National Democratic Party or possibly by some combination of both. It cannot be gainsaid that the national conventions of the two major political parties of this country will have a direct and extremely significant effect upon the government of this nation for the next four years. The public generally and each state, by virtue of its representation at those conventions, have a substantial interest in the composition of the national party conventions. This no doubt is also true of the various sectors of the voting

[10] *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971) and *Byrne* v. *Karalexis*, 491 U.S. 216 (1971).

[11] *Particle Data Laboratories, Inc.* v. *Colter Electronics, Inc.*, 420 F.2d 1174, 1178 (7th Cir. 1969).

populace who supposedly were assured representation by the newly adopted convention guidelines—blacks, women and the young. Meritorious arguments, on the other hand, can be advanced on behalf of delegates elected at an open election, in which anyone could (as many did) run by filing a nomination petition containing a relatively minimal number of signatures.

These merit matters, however, are not really involved in the posture of the litigation before us. We are, or should be, only concerned with whether the granting of the preliminary injunction in this particular case constituted an abuse of discretion.

Basically, the plaintiffs in the court below asserted they had rights under the First Amendment to make political speeches, to discuss with the press and to hold political meetings. They have taken steps to exercise these rights. There has been no real contention that these are not guaranteed federal rights which should be protected. The state court complaint filed by the defendants seeks an injunction. The prayer of the state court complaint is couched in terms of enjoining interference with elected delegates functioning as such. We need only look at the complaint in the federal court below to ascertain what the proposed interference is. That, in essence, is nothing more nor less than the exercise of guaranteed First Amendment rights.

I find it difficult to say a district court has been arbitrary or has abused its discretion when preliminarily enjoining pursuit of a state court action whose end purpose is to suppress the rights of freedom of speech and freedom of assembly. The mere imposition of the necessity of defending against a lawsuit seeking to suppress and put down

the exercise of rights seems to me to be an impermissible chilling of those rights.

It is insufficient, it seems to me, to say that the state courts as well as the federal courts protect federal rights. There should, as a threshold matter, be no necessity for having to go into state court to defend those federal rights.

As Mr. Justice Harlan so aptly put the matter:

> ". . . timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."[12]

We do not view matters with hindsight in considering the determination of cases. Nevertheless, it is of interest to note the sequel of the panel's action in vacating the preliminary injunction as related in the Chicago Sun-Times of June 30, 1972, as follows:

> "A Circuit Court judge Thursday issued a temporary restraining order barring the Chicago challengers from seeking to take the seats of 59 Daley organization delegates to the Democratic National Convention.
>
> "Circuit Court Judge Daniel O'Brien acted almost immediately after a three-judge federal panel dissolved an injunction that had prevented organization attorneys from seeking the order against the challengers.
>
> "O'Brien acted in the absence of attorneys for the challengers, who had flown to Washington for a national party Credentials Committee hearing on the challenge."

[12] *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 163 (1968).

Irrespective of what subsequent action the state court took, or might take, I am of the opinion that we as a reviewing court should not have determined, when viewing all of the factual circumstances including timing[13] in the light of the applicable legal context, that the district court had abused its discretion. The real likelihood of a constitutional wrong should have been sufficient to sustain the action below.

[13] The National Democratic Convention is scheduled to commence July 10, 1972, and plaintiffs were at the time of the vacation of the order in the process of asserting their claimed rights before a committee of the National Democratic Party.

APPENDIX H.

Opinion in Chambers

COUSINS ET AL. *v.* *WIGODA*

ON APPLICATION FOR STAY

No. A—1. Decided July 1, 1972

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have applied to me as Circuit Justice to stay an order entered by the Court of Appeals for the Seventh Circuit on Thursday, June 29. A divided panel of that court vacated an injunction issued at applicants' behest by the District Court for the Northern District of Illinois and further ordered that its mandate issue immediately. Because applicants' application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.

In April 1972, following the Illinois primary election, respondent Wigoda brought an action in the circuit court of Cook County, Illinois, requesting a declaratory judgment that he and others had been duly elected as delegates to the Democratic National Convention in accordance with Illinois law, and seeking an injunction against applicants to prohibit them from interfering with or impeding the functioning of respondent as a duly elected delegate.

Applicants removed this action to the United States District Court, from which it was then remanded to the state court. Applicants then brought a separate action in the District Court, alleging that the pendency of the

state court action infringed their associational rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. In reliance on 42 U.S.C. § 1983, they sought an injunction against further prosecution of the state court action. The District Court heard evidence and enjoined the prosecution of so much of the state court action as sought injunctive relief against the applicants, leaving the state court free to proceed with the declaratory judgment aspect of respondent's action. Respondent appealed from the order of the District Court granting injunctive relief, and the Court of Appeals then entered the order described above vacating the injunction of the District Court.

Both the state and federal court actions arise out of disputes between the parties as to what group of delegates from Illinois shall be seated at the Democratic National Convention to be held in Miami Beach, Florida, beginning July 10. Respondent contends that he and the others whom he seeks to represent were delegates elected to the convention in accordance with Illinois law at the Illinois primary election. Applicants contend that the Illinois delegate selection process does not conform to standards established by the national Democratic Party, and that, therefore, they and others associated with them, rather than respondent, should be seated by the Democratic National Convention.

Since the Court of Appeals entered its order of June 29, two additional events have supervened. On June 30, the circuit court of Cook County in which respondent's original action was pending entered a temporary restraining order enjoining applicants from "submitting or causing

to be submitted to the National Democratic Party, the Democratic National Committee or the Credentials Committee thereof, the name, or names, of any person, or persons, as prospective delegates to the 1972 Democratic National Convention" from various Illinois districts. That order also provided that "except as hereinbefore ordered" nothing in the order should prevent the applicants from "speaking on behalf of their challenge before the Credentials Committee, holding meetings or engaging in other activities commensurate with their rights of free speech and association under the First and Fourteenth Amendments to the United States Constitution." The circuit court further ordered that the matter be set for hearing on the motion of respondent for a preliminary injunction at 11 a. m. on Wednesday, July 5, in that court.

On June 30, the Credentials Committee of the Democratic National Convention voted to sustain the challenge made by applicants and others to respondent and the delegates associated with him, and to recommend to the convention that applicants and other delegates associated with them be seated by the Democratic National Convention. It is my understanding that this action on the part of the Credentials Committee is subject to review by the convention at its meeting in Miami Beach.

At the outset I am faced with a problem which, if not technically one of authority, is at the very least one of the scope of my discretion in acting on the application. The authority of a Circuit Justice to grant a stay in cases such as this stems from the provisions of 28 U.S.C. § 2101

(f), which reads in pertinent part as follows:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . ."

While this case is one in which the judgment of the Court of Appeals is undoubtedly "subject to review by the Supreme Court on writ of certiorari," as a practical matter it will become moot upon the adjournment of the Democratic National Convention, which customarily takes place in the latter part of the week in which the convention opens. On June 29, this Court adjourned until the first Monday in October, as is its annual custom. There will therefore be no possibility of this Court's convening and granting a writ of certiorari to review the judgment below unless THE CHIEF JUSTICE should determine that a Special Term of Court be convened in order to hear this case. Such Special Terms have, to my knowledge, been held only four times in the recent history of the Court: In 1942 the Court was convened to consider whether the President had authority in time of war to exclude enemy aliens from access to civilian courts, and to order them tried before military tribunals for acts of sabotage. *Ex parte Quirin*, 317 U. S. 1 (1942). A Special Term was convened in 1953 to hear the Government's motion to vacate a stay of execution of a death sentence against the Rosenbergs for espionage, after exhaustive appellate review of

their conviction. *Rosenberg* v. *United States*, 346 U. S. 273 (1953). See also *id.*, at 271. In 1958 a Special Term was held to review the Little Rock school desegregation case in time for implementation in the fall school term. *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

Without in any way disparaging the importance of this case not only to the parties involved in it, but to the political processes of the country, I simply do not believe that it is the same type of case which has caused the Court to convene in Special Term on previous occasions. Both the presumptive availability of the Illinois courts to redress any deprivation of applicants' constitutional rights, which I discuss in more detail below, and the necessarily highly speculative nature of any connection between the outstanding order of the state court and the choice of a presidential candidate by the Democratic National Convention lead me to conclude that this case is not comparable to those. I therefore conclude that this is not a case in which I would be warranted in requesting THE CHIEF JUSTICE to convene a special session of this Court. See the opinion of Mr. Justice Harlan in chambers in *Travia* v. *Lomenzo*, 86 S. Ct. 7, 15 L. Ed. 2d 46 (1965).

Having so concluded, I must recognize the fact that were I to grant the stay requested by applicants, the result would be a determination on the merits of the federal litigation in their favor without any prospect of review of my action by the full membership of this Court. While I think that the provisions of 28 U.S.C. § 2101 (f) confer upon me the technical authority to grant a stay in these circumstances, I would be moved to use that authority only if I were satisfied that the judgment under review repre-

sented the most egregious departure from wholly settled principles of law established by the decisions of this Court.

The majority of the panel of the Court of Appeals, in its opinion released yesterday, relied on the principles of comity between federal and state courts as enunciated by this Court's decisions in *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Mitchum* v. *Foster*, 407 U. S. 225 (1972). While *Younger* and its companion cases involved state criminal prosecutions, the principles of federal comity upon which it was based are enunciated in earlier decisions of this Court dealing with civil as well as criminal matters. See the cases cited in *Mitchum, supra,* at 243. The Court in *Mitchum,* after holding that 42 U. S. C. § 1983, under which petitioners brought this action in the District Court, was an exception to the provisions of the Anti-Injunction Act, 28 U. S. C. § 2283, went on to say:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Ibid.*

While the test to be applied may be less stringent in civil cases than in criminal, the cases cited in *Mitchum* make clear that the federal courts will not casually enjoin the conduct of pending state court proceedings of either type. Applicants make out what must be described as at least a plausible case that a portion of the decree issued by the circuit court of Cook County does abridge their associational rights guaranteed by the First and Fourteenth Amendments. But the teaching of *Younger, supra,* and *Mitchum, supra,* as I understand them, is that a plausible claim of constitutional infringement does not automatical-

ly entitle one to avail himself of the injunctive processes of the federal courts in order to prevent the conduct of pending litigation in the state courts. The opinion issued by the Court of Appeals majority specifically alluded to applicants' failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to applicants for this purpose.

Mindful, therefore, of the principles of comity enjoined by our federal system, of the deference due to the judgment of the Court of Appeals (see *Breswick & Co.* v. *United States,* 75 S. Ct. 912, 100 L. Ed. 1510 (1955) (Harlan, J., in chambers)), and of the extraordinary burden which falls upon applicants when they seek a stay from a single Justice which would in effect dispose of the litigation on its merits, I conclude that they have failed to meet that burden. An order will therefore be entered denying the application for a stay of the order and mandate of the Court of Appeals.

APPENDIX I.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT — CHANCERY DIVISION

PAUL T. WIGODA, etc,

Plaintiff,

v.

WILLIAM COUSINS, et al.,

Defendants.

No. 72 CH 2288

ORDER

This cause coming to be heard on the motion of plaintiff, Paul T. Wigoda, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts similarly situated, for preliminary injunction, due and proper notice being given, counsel for plaintiff and defendants being present and the Court being fully advised in the premises, and

The Court having heard oral argument and having considered the pleadings and other material filed with the Court and having heard and considered argument on the motion of defendants to dismiss the complaint without limitation to said argument, and said motion to dismiss having been denied and the defendants having rested thereon and having advised the Court that they would

make no answer to the complaint but would stand on their motion, and plaintiffs having proceeded with the evidence, and defendants' counsel having taken part in the examination and presentation of the evidence of plaintiff by objection and otherwise, and the defendants having entered into stipulation of fact on the record with plaintiff and further having offered evidence on behalf of defendants and the Court having considered the evidence of all of the parties hereto and the arguments of counsel;

The Court finds:

1. This action is brought by plaintiff pursuant to Ill. Rev. Stat. ch. 69 §§1 and 3 to enjoin defendants from interfering with the right of plaintiff and the class of challenged and uncommitted delegates and alternates to the 1972 Democratic Convention (hereinafter the "Convention") to participate in said Convention as duly elected delegates and alternates.

2. Plaintiff is a citizen and resident of the State of Illinois, is a registered voter of the 9th Congressional District in which he resides, is an attorney at law and an alderman of the City of Chicago, having been duly elected to that office by the residents of the 49th Ward in 1971. As described hereinafter, plaintiff was duly elected a delegate of the Convention in accordance with the provisions of the Illinois Election Code.

3. Plaintiff is the representative of the class of persons residing in the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois who were duly elected as "uncommitted" delegates and alternates to the Convention in accordance with the provisions

of the Illinois Election Code and fairly and adequately represents said class. The issues of fact and law herein are common to plaintiff and all other members of the class. Plaintiff and the class thus described are hereinafter collectively referred to for convenience as "the delegates".

4. The delegates are persons of white, black and Latin American extraction and include males, females and persons of all ages. The delegates are so numerous that joinder of all of them in litigation is impracticable.

5. Defendants are citizens of the State of Illinois and residents of Cook County.

6. The selection of delegates to national conventions of the political parties is duly provided for and controlled by the statutes of the State of Illinois, to-wit, §§7-14 and 14.1 of the Illinois Election Code (Ill.Rev.Stat. ch. 46, §§7-14 and 7-14.1) and other sections hereinafter cited. As stated in Section 7-1 of the Code, the election of delegates and alternates "to National nominating conventions . . . shall be made in the manner provided in this Article 7 and not otherwise."

7. On or before January 19, 1972, plaintiff and the delegates filed nominating petitions signed by at least one-half of one percent of the qualified primary electors of the Democratic Party residing in their respective Congressional districts. Said petitions were completed in accordance with the provisions of Section 7-10 of the Illinois Election Code (Ill.Rev.Stat. ch. 46, §§7-10) and filed in accordance with Section 7-12 of the Code. Defendants made no challenge to such petitions nor were such petitions nullified or stricken by the electoral boards of the City of Chicago

or the County of Cook. Plaintiff and the delegates were thereafter certified by the State Electoral Board in accordance with Section 7-14 of the Code and their names properly placed on the ballots for the primary election of March 21, 1972.

8. Thereafter, on March 21, 1972, plaintiff and the delegates were duly elected by a majority of the qualified electors of the Democratic Party voting in their respective Congressional districts in accordance with Sections 7-46 through 7-51 of the Code. The results of such elections were canvassed, certified and reported as required by Section 7-53 through 7-58 of the Code.

9. Section 7-63 of the Code provides a procedure by which the results of a primary election of a political party may be contested. The objecting party must file with the Clerk of this Court a petition in writing setting forth the grounds of contest within ten days after the completion of the canvas of the returns in such election by the canvassing board. Defendants have at no time availed themselves of the foregoing procedure or any other lawful procedure for the challenging of elections.

10. On April 18, 1972, the Secretary of State of the State of Illinois, pursuant to Section 7-58 of the Code, issued his proclamation announcing the election of the delegates.

11. Thereafter, on June 22 and June 24, 1972, those defendants listed in Schedule A hereto were selected as "alternative" delegates and alternates to the Convention in caucuses governed by certain rules of procedure established by the defendants and adopted without regard to the applicable requirements of the Illinois Election Code.

12. In contrast, plaintiff and the class he represents were elected in a free, equal, open and non-discriminatory election in which, in accord with stipulations made by defendants herein, anyone could run for office and any qualified person could vote. In said election, there were 180 candidates for 62 delegate seats.

13. No other election for delegate was conducted under the Illinois Election Code other than that election at which plaintiff and the class he represents were elected to be delegates to the Democratic National Convention.

14. On June 30, 1972, the defendants listed in Schedule A were, by resolution of the Credentials Committee of the Democratic National Convention, certified as delegates and alternates to the Convention in place of plaintiff and the other members of the class who were duly and properly elected under the Illinois Election Code.

15. Defendants established themselves solely on the basis of their own authority to select delegates from the above-mentioned Illinois Congressional Districts and without any legal justification or authority from any other people or the laws of the State of Illinois.

16. By virtue of the findings herein, the Court finds irreparable injury as follows:

(a) Plaintiff and the class he represents have been deprived of a place of authority, prestige and position to which they were entitled by virtue of the votes of the persons participating in the aforementioned primary election held pursuant to and in accord with the Illinois Election Code;

(b) The duly qualified voters who caused plaintiff and the class of persons he represents to be elected have been deprived of their right to vote and to vote effectively;

(c) The electoral process in the State of Illinois has been subverted, thwarted and nullified by the actions of defendants and persons acting in conjunction and association therewith;

(d) Plaintiff and the class of persons he represents have been deprived of their rights, obtained pursuant to a lawful election, of participating with other party functionaries in the conduct of the Democratic National Convention and from taking part in decisions to be made therein, all of which will be vital to the electorate in the State of Illinois who participated in the duly authorized election.

17. The fact that the Democratic National Convention is scheduled to convene on Monday, July 10, 1972 renders the aforesaid harm immediate and, unless defendants are herein enjoined, inevitably irreparable.

18. Each of the defendants listed in Schedule A have formally appeared before this Court and have submitted themselves to its jurisdiction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from acting or purporting to act

as a delegate to the Democratic National Convention to be held commencing on July 10, 1972 from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th or 11th Congressional districts of the State of Illinois or from performing the functions of delegates from the aforesaid districts including but not limited to voting in the aforesaid Convention or in official or duly designated committees thereof.

2. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from receiving or accepting any credentials, badges or other indicia of delegate status from the officials of the aforesaid Democratic National Convention or its official or duly designated committees.

Notice of entry of this Order to counsel for the defendants shall be deemed to be notice to each of the persons on whose behalf counsel has appeared;

IT IS FURTHER ORDERED, that notice of this injunction may be served by any person designated by plaintiff or his counsel.

ENTER:

Dated: July 8, 1972

/s/ Daniel A. Covelli
Judge

APPENDIX J.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL T. WIGODA, etc.,

Plaintiff,

v.

WILLIAM COUSINS, et al.,

Defendants.

No. 72 CH 2288

ORDER

This cause coming on to be heard on the motion of Paul T. Wigoda, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the National Democratic Convention from the 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated (hereinafter "the delegates"), by his attorneys, Jerome T. Torshen, Ltd. and Earl L. Neal, and by the duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st Illinois Congressional District (hereinafter also included in the description "the delegates"), for supplemental relief in clarification of the

order of this Court herein entered on July 8, 1972, and in aid of this Court's jurisdiction and to protect and effectuate the judgment of this Court herein entered on July 8, 1972, due and proper notice being given, the cause coming before the Court as a set matter, counsel for all of the parties except those hereinafter specified on Schedule B being present, and the Court being fully advised in the premises; and

The Court having provided an opportunity to defendants and each of them to respond to the motion for supplemental relief, and having considered motions to dismiss and other motions filed on behalf of the defendants and directed to the motion of plaintiff, and having considered the pleadings and other material filed with the Court and having heard whatever evidence without limitation that the parties or any of them deemed fit and proper to present to the Court, and all parties represented by counsel having taken part in the presentation of evidence and the examination of witnesses, and no answer having been filed to the said Motion for Supplemental Relief, and the Court having considered the evidence of all of the parties hereto and the arguments of counsel including the record heretofore made in this cause at the hearing of July 8, 1972, and the findings and order of the Court entered on said date;

The Court finds:

1. On August 5, 1972, a caucus of delegates and alternates to the 1972 Democratic National Convention from each of the Illinois Congressional Districts will be held.

2. On July 8, 1972, with counsel for all parties being present, after due notice and hearing and upon full consideration of the arguments and evidence of counsel for all of the parties hereto, this Court issued its injunction as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:
>
> "1. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from acting or purporting to act as a delegate to the Democratic Convention to be held commencing on July 10, 1972, from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th or 11th Congressional districts of the State of Illinois or from performing the functions of delegates from the aforesaid districts including but not limited to voting in the aforesaid Convention or in official or duly designated committees thereof.
>
> "2. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from receiving or accepting any credentials, badges or other indicia of delegate status from the officials of the aforesaid Democratic National Convention or its official or duly designated committees."

3. Each of the persons named in Schedules A and B hereto, though not duly elected delegate or alternate to the Democratic National Convention, in accordance with the provisions of the Illinois Election Code, acted or purported to act as a delegate or alternate to said convention and sought to perform the functions of delegate or alter-

nate including voting on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts.

4. If any of the persons subject to the July 8, 1972 order of this Court named on Schedule A hereto, or if any of the persons named on Schedule B hereto, which persons stand in a position identical to those named on Schedule A insofar as they claim status as a delegate, act or purport to act as a delegate from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts at the aforesaid caucus to be held on August 5, 1972, the order of July 8, 1972, heretofore entered by this Court will be subverted, the Court's decree will, in part, be nullified, the Court's jurisdiction will be undermined and plaintiff and the class he represents will be deprived of the fruits of the litigation.

5. This Court by paragraphs 8, 10, 12 and 13 of its order of July 8, 1972, has recognized that plaintiff and the delegates and alternates he represents are the only persons who have been duly elected delegates and alternates in accordance with and pursuant to the provisions of the Illinois Election Code.

6. By virtue of the foregoing, plaintiff and the delegates and alternates are entitled to supplemental relief in clarification of the July 8, 1972 order to effectuate the said order of this Court.

7. The relief herein sought as supplemental and in clarification of the relief heretofore granted to the delegates and alternates is required in the instant circumstances, and

The Court further finds:

1. Those persons referred to herein as the delegates and alternates are the only persons elected pursuant to the Illinois Election Code as delegates and alternates to the Democratic National Convention.

2. The election at which the delegates and alternates were elected was conducted pursuant to the Illinois Election Code and the Constitution of the State of Illinois and was free and equal and open to all qualified persons as candidates and voters without limitation.

3. The process by which defendants purported to become representatives of the people of the State of Illinois was secret, restrictive, discriminatory, without foundation in law and without regard or recognition to the individual citizens of the congressional districts hereinabove mentioned who voted in the election conducted pursuant to the Illinois Election Code.

4. The fact that on August 5, 1972, a caucus of delegates and alternates from each of the Illinois Congressional Districts will be held renders additional harm to the duly elected delegates and alternates and the voters immediate and inevitably irreparable if the rights of said delegates are further interfered with.

5. Each of the defendants listed in Schedules A and B hereto is before the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Court affirms, adopts and incorporates herein by reference as if set out herein *in haec verba* its

entire order of July 8, 1972, and each and every finding set forth therein.

2. That plaintiff and the delegates and alternates whom he represents and those persons herein referred to as delegates and alternates have been duly elected to their offices by the voters of their respective congressional districts in accordance with the provisions of the Illinois Election Code; that they are the only persons elected pursuant to and in accord therewith and that plaintiff and the delegates and alternates are entitled to take their seats and to participate fully in the caucus to be held on August 5, 1972, and that said participation includes the right to vote in said caucus and in duly designated committees thereof and to take part in and perform the function of delegates or alternates in any other activities in which delegates or alternates duly elected pursuant to the statutes of the State of Illinois are entitled to take part.

3. That those persons named on Schedules A and B hereto, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined from acting or purporting to act as a delegate or alternate in said caucus to be held August 5, 1972, from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois or from performing the function of delegate or alternate from or on behalf of the aforesaid districts thereat including but not limited to voting in the aforesaid caucus of August 5, 1972, or in any official or duly designated committee thereof;

4. That those persons named on Schedules A and B hereto, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined from interfering with the taking of their seats in the caucus of August 5, 1972, by the duly elected delegates or alternates and from seeking or taking credentials at such meeting if any such credentials are needed, and are further enjoined from voting in said caucus or from taking part therein as delegates or alternates.

5. That the Court retain jurisdiction over this matter for the purpose of providing whatever further collateral, supplemental or clarifying relief as may be required in the premises.

6. That notice of entry of this order to counsel for the defendants shall be deemed to be notice to each of the persons on whose behalf counsel has appeared and that notice of this order may be served upon those persons in Schedule B who have not retained counsel by any persons designed by plaintiff or his counsel.

ENTER:

/s/ D. A. Covelli

Judge

APPENDIX K.

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD
62706

November 29, 1973

Justin Taft
Clerk

Telephone
Area Code 217
525-2035

Mr. Wayne W. Whalen
Attorney at Law
231 South LaSalle St.
Chicago, Ill. 60604

No. 46227—Paul T. Wigoda, etc., respondent, vs. William Cousins, et al., petitioners. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Justin Taft
Clerk of the Supreme Court

Supreme Court, U. S.
FILED
JUN 12 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSENS, ET AL.,

Petitioners,

vs.

PAUL T. WENDA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

Certiorari Granted March 4, 1974

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Opinion of Court of Appeals for the District of Columbia in Keane v. National Democratic Party (July 5, 1972) (Exhibit to Report of Proceedings in Circuit Court of Cook County, July 8, 1972) 40

Opinion of Supreme Court of United States in Keane v. National Democratic Party (July 7, 1972) (Exhibit to Report of Proceedings in Circuit Court of Cook County, July 8, 1972) 64

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DATES OF RELEVANT PROCEEDINGS IN LOWER COURTS

1. Respondents' Complaint Filed in Circuit Court of Cook County, April 19, 1972
2. Petitioners' Petition for Removal to the United States District Court for the Northern District of Illinois Filed, April 20, 1972
3. Memorandum Opinion and Order Remanding Case to Circuit Court of Cook Couuty (Will, J.), May 17, 1972
4. Petitioners' Motion to Dismiss and for Summary Judgment Filed in Circuit Court of Cook County, July 5, 1972
5. Order of Circuit Court of Cook County Granting Respondents' Motion for Preliminary Injunction, July 8, 1972
6. Order of Circuit Court of Cook County Denying Petitioners' Motions to Vacate July 8 Injunction, for Recusal of Judge, and for Change of Venue, July 20, 1972
7. Respondents' Motion for Supplemental Injunction Filed in Circuit Court of Cook County, July 27, 1972
8. Order of Circuit Court of Cook County Granting Respondents' Motion for Supplemental Injunction, August 2, 1972
9. Order of Illinois Supreme Court Denying Petitioners' Emergency Motion for Leave to Appeal and For Stay Pending Appeal, August 4, 1972
10. Opinion and Judgment of Illinois Appellate Court, September 12, 1973
11. Order of Illinois Supreme Court Denying Leave to Appeal, November 29, 1973.

[*Filed April 19, 1972*]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT — CHANCERY DIVISION

PAUL T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated,

Plaintiff,

vs.

WILLIAM COUSINS, PATTY CROWLEY, BARBARA HILLMAN, REV. JESSE JACKSON, KATHERINE KENNEDY, MARY LEE LEAHY, ANNA LANGFORD, ALBERT RABY, WILLIAM SINGER and MIGUEL VELAZQUEZ,

Defendants.

72CH 2288

COMPLAINT FOR INJUNCTION AND OTHER RELIEF

Now comes the plaintiff, Paul T. Wigoda, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th,

9th and 11th Illinois Congressional Districts similarly situated, by his attorney, Jerome H. Torshen, Ltd. and complaining of the defendants William Cousins, Patty Crowley, Barbara Hillman, Rev. Jesse Jackson, Katherine Kennedy, Mary Lee Leahy, Anna Langford, Albert Raby, William Singer and Miguel Velazques, states as follows:

1. This action is brought by plaintiff pursuant to Ill. Rev. Stat. ch. 69 §§1 and 3 to enjoin defendants from interfering with the right of plaintiff and the class of challenged and uncommitted delegates and alternates to the 1972 Democratic Convention (hereinafter the "Convention") to participate in said Convention as duly elected delegates and alternates.

2. Plaintiff is a citizen and resident of the State of Illinois, is a registered voter of the 9th Congressional District in which he resides, is an attorney at law and an alderman of the City of Chicago, having been duly elected to that office by the residents of the 49th Ward in 1971. As described hereinafter, plaintiff was duly elected a delegate of the Convention in accordance with the provisions of the Illinois Election Code.

3. Plaintiff brings this action as a representative of the class of persons residing in the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois who were duly elected as "uncommitted' delegates and alternates to the Convention in accordance with the provisions of the Illinois Election Code and whose right to hold and perform the duties of such office has been and will continue to be harassed and interfered with by defendants unless the latter are enjoined. Plaintiff and the class thus described are hereinafter collectively referred to for convenience as "the delegates".

4. The delegates are persons of white, black and Latin American extraction and include males, females and persons of all ages. The delegates are so numerous that joinder of all of them in litigation is impracticable. The actions and threatened further actions of defendants described herein are intended to and will have a common effect upon all of the delegates, and plaintiff's claims for relief are therefore typical of all the delegates. Defendants have acted toward plaintiff and the delegates in the same manner, making appropriate the injunctive and declaratory relief sought for the class as a whole.

5. Defendants are citizens of the State of Illinois and residents of Cook County.

6. The selection of delegates to national conventions of the political parties is duly provided for and controlled by the statutes of the State of Illinois, to-wit, §§7-14 and 14.1 of the Illinois Election Code (Ill. Rev. Stat. ch. 46, §§7-14 and 7-14.1) and other sections hereinafter cited. As stated in Section 7-1 of the Code, the election of delegates and alternates "to National nominating conventions . . . shall be made in the manner provided in this Article 7 and not otherwise."

7. On or before January 19, 1972, plaintiff and the delegates filed nominating petitions signed by at least one-half of one percent of the qualified primary electors of the Democratic Party residing in their respective Congressional districts. Said petitions were completed in accordance with the provisions of Section 7-10 of the Illinois Election Code (Ill. Rev. Stat. ch. 46, §§7-10) and filed in accordance with Section 7-12 of the Code. Defendants made no challenge to such petitions nor were such petitions nullified or stricken by the Chicago or Cook County Boards of Election Commissioners. Plaintiff and the delegates were

thereafter certified by the State Election Board in accordance with Section 7-14 of the Code and their names properly placed on the ballots for the primary election of March 21, 1972.

8. Thereafter, on March 21, 1972, plaintiff and the delegates were duly elected by a majority of the qualified electors of the Democratic Party voting in their respective Congressional districts in accordance with Sections 7-46 through 7-51 of the Code. The results of such elections were canvassed, certified and reported as required by Sections 7-53 through 7-58 of the Code.

9. Section 7-63 of the Code provides a procedure by which the results of a primary election of a political party may be contested. The objecting party must file with the Clerk of this Court a petition in writing setting forth the grounds of contest within ten days after the completion of the canvas of the returns in such election by the canvassing board. Defendants have at no time availed themselves of the foregoing procedure or any other lawful procedure for the challenging of elections.

10. On April 18, 1972, the Secretary of State of the State of Illinois, pursuant to Section 7-58 of the Code, issued his proclamation announcing the election of the delegates.

11. Notwithstanding the foregoing, on March 31, 1972, defendants filed with the acting chairman of the Credentials Committee of the 1972 Democratic Convention ("the Committee") a "Notice of Intent to Challenge" (attached hereto as Exhibit A) stating that said defendants intend to challenge the seating of plaintiff and the delegates.

12. Thereafter, defendants filed a "Statement of Grounds of Challenge Against the Proposed 'Uncommitted' Delegation to the 1972 Democratic National Convention From the Districts Encompassing the City of Chicago", a copy of which is attached hereto as Exhibit B. Defendants have publicly and repeatedly stated their intent to prevent plaintiff and the delegates from assuming their seats at the Convention and to substitute in their place a slate of delegates to the Convention not elected in accordance with the provisions of the Illinois Election Code.

13. The aforementioned challenge, if successful, will result in defendants' permanent interference with the right of plaintiff and of the delegates to serve in the office to which they have been duly elected. The challenge is thus a device to undermine and restrain the lawful operation of the Illinois Election Code and the assumption of office by plaintiff and the delegates and seeks to nullify the Illinois Election Code and to disregard the results of a lawful election.

14. The defendants' challenge leaves the participation of plaintiff and the delegates in the preconvention proceedings and the convention itself unsettled and constitutes an unlawful harassment of and interference with plaintiff and the delegates and an impediment to the orderly assumption of their duties and the work of their office.

15. Plaintiff and the delegates are without an adequate remedy at law.

Wherefore, plaintiff and the delegates pray:

1. That the Court declare, adjudge and decree that plaintiff is the representative of the class of "challenged and uncommitted" delegates and alternates to the 1972 Democratic National Convention.

2. That the Court declare, adjudge and decree that plaintiff and the delegates and alternates described herein

have been duly elected in accordance with the provisions of the Illinois Election Code and are therefore entitled to take their seats as such delegates and alternates at the 1972 Democratic National Convention and to function and participate fully therein.

3. That defendants be enjoined from taking any action, the purpose, intent or effect of which would be to interfere with or impede the functioning of plaintiff and the delegates and alternates in their duly elected office.

4. That plaintiff and the delegates and alternates have such other and further relief as the Court may deem necessary in the premises.

PAUL T. WIGODA, individually and
on behalf of all other duly elected,
challenged and uncommitted delegates
and alternates to the 1972 Democratic
National Convention from the 1st, 2nd,
3rd, 5th, 7th, 8th, 9th and 11th
Illinois Congressional Districts
similarly situated, Plaintiff
By *Jerome H. Torshen, Ltd.*
Jerome H. Torshen, Ltd.

JEROME H. TORSHEN, LTD.
11 South LaSalle Street
Chicago, Illinois 60603
372-9282

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

PAUL T. WIGODA, being duly sworn upon oath, deposes and says that he has read the foregoing Complaint for Injunction and Other Relief and states the facts therein alleged are true.

Paul T. Wigoda

SUBSCRIBED AND SWORN TO
before me this 19th day
of April, 1972.
Maria A. Cabel
Notary Public

Memorandum Opinion

[*Issued May 17, 1972*]

Paul T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated, Plaintiffs,

v.

William COUSINS et al., Defendants.

No. 72 C 1001.

United States District Court,
N. D. Illinois, E. D.
May 17, 1972.

MEMORANDUM OPINION

WILL, District Judge.

Plaintiff originally brought this action in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, seeking 1) to have himself and others similarly situated declared duly elected delegates and alternates to the 1972 Democratic National Convention (the "Convention") in accordance with Illinois law and therefore entitled to take their seats at the Convention; and 2) to enjoin the defendants from taking any action that would interfere with plaintiffs' functioning as delegates and alternates to the Convention. Defendants removed the case to this Court pursuant to 28 U.S.C. § 1446, alleging that the case was properly removable to a Federal Court under 28 U.S.C. §§ 1441 and 1443. Plaintiff then moved to have the case remanded back to the State Court pursuant to 28 U.S.C. § 1447(c) on the ground that this Court lacks jurisdiction over the subject matter of the dispute. Inasmuch as we find that there is no basis for federal jurisdiction over the subject matter of this dispute, we grant plaintiffs' motion and remand the case to the Circuit Court of Cook County.

Memorandum Opinion

Before proceeding with an examination of the possible jurisdictional bases for this cause of action, a more detailed statement of the relevant facts is necessary. In a primary election held in Illinois on March 21, 1972, plaintiff and the class he purports to represent (the "uncommitted delegation") were elected as "uncommitted" delegates and alternates to the Convention. That they were elected in accordance with the provisions of the Illinois Election Code relating to the selection of delegates to a national convention of a political party, Ill.Rev.Stat. ch. 46 §§ 7-14 and 7-14.1, is not disputed. On March 31, the defendants filed with the Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention (the "Credentials Committee") a "Notice of Intent to Challenge" the seating of the members of the plaintiff class as delegates and alternates to the Convention.

Thereafter, the defendants additionally filed a "Statement of Grounds of Challenge Against the Proposed 'Uncommitted' Delegates to the 1972 Democratic National Convention from the Districts Encompassing the City of Chicago" in which they alleged that the members of the plaintiff class were selected in violation of the Rules adopted by the Democratic National Committee and incorporated into the Call of the 1972 Democratic National Convention which set forth standards and qualifications to be met in the selection of delegates from each of the states to the Convention (the so-called "McGovern Rules"). Specifically, the defendants contend that "[b]lacks, Latin Americans, women and young people are grossly underrepresented on the Proposed Delegation and in all Chicago party affairs" and that "the Proposed Delegation was slated, endorsed, and supported by the party organization without open slate-making procedures,

without published rules and by party officials chosen prior to 1972."

On April 19, plaintiff filed a civil action in the Circuit Court of Cook County, County Department, Chancery Division, asking the court: (1) to declare plaintiff a proper class representative of the "uncommitted" delegates and alternates to the Convention; (2) to declare all members of the plaintiff class to be duly elected delegates and alternates in accordance with Illinois law and therefore entitled to take their seats as such at the Convention; (3) to enjoin the defendants from taking any action which would interfere with members of the plaintiff class functioning as delegates and alternates (e. g., pursuing their challenge with the Credentials Committee); and (4) to grant any other appropriate relief. On April 20, defendants filed a petition for removal of that action to this Court pursuant to 28 U.S.C. § 1446. On April 21, plaintiff filed a motion for preliminary injunction in the Circuit Court of Cook County which became dormant due to the removal of the case to this Court.

On April 24, plaintiff moved to have the case remanded to the state court pursuant to 28 U.S.C. § 1447 on the ground that this Court lacks jurisdiction over the case. In addition, plaintiff moved for an order temporarily restraining defendants from proceeding with their challenge to the Credentials Committee. Both motions were taken under advisement pending a determination whether we have jurisdiction. On May 2, plaintiff submitted a motion for a preliminary injunction enjoining defendants from proceeding before the Credentials Committee.

After discussion with plaintiff's counsel in open court, the Court ruled on the question of enjoining defendants pending a determination of the jurisdictional question. The motion for a preliminary injunction and the motion for a temporary restraining order were denied on May 2,

inasmuch as there had been no showing of immediate and irreparable harm as required by Rule 65(b), Fed.R.Civ.P., and because the underlying claim for relief in the case—an order enjoining the defendants from exercising their First Amendment rights within procedures set up by a national political party—raises substantial constitutional questions which ought not be resolved on a motion for a temporary restraining order or preliminary injunction but only after a full hearing on the merits.

Given that background of the case, it must now be determined whether this Court has jurisdiction over the subject matter of the dispute. In their petition for remand, defendants have asserted two statutory bases for removal jurisdiction—28 U.S.C. §§ 1441 and 1443—each of which will be discussed separately.

I. SECTION 1441

In essence, section 1441 provides that removal is permissible if the federal court to which the action is being removed would have had jurisdiction over the subject matter and parties if the action had originally been brought in that federal court. Inasmuch as the parties to the instant action are all citizens of Illinois, in order for removal to be proper under § 1441, the action must have been maintainable, if brought here originally, under federal question jurisdiction, 28 U.S.C. § 1331, i. e., the matter in controversy must exceed $10,000 in value and arise under the Constitution, laws, or treaties of the United States.

The defendants have proffered several bases for federal question jurisdiction, asserting that the controversy arises under the Constitution of the United States—Article II § 1, 1st Amendment, 14th Amendment, and 15th Amendment. It is important to note initially that any basis for federal jurisdiction must stem solely from the

allegations of the complaint. Great Northern Ry. Co. v. Galbreath Cattle Co., 271 U.S. 99, 46 S.Ct. 439, 70 L.Ed. 854 (1926); Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); Crow v. Wyoming Timber Products Co., 424 F.2d 93 (10th Cir. 1970). See also, Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). The defendants' primary argument is that, since the case involves a controversy connected with the election of the President of the United States, albeit several steps removed from the formal selection of the President by the Electoral College pursuant to Article II § 1, as amended, it arises under the Constitution. They argue that the request in the complaint that the court declare that the uncommitted delegation is entitled to sit as such at the Convention raises the question whether the selection of this uncommitted delegation in accordance with Illinois election laws constitutes a bar to a challenge under the rules of the National Democratic Party and that this question can only be decided under the Federal Constitution.

No case has been cited in support of this argument apparently because it is a question of first impression. We hold that the eligibility of delegates to a national party convention is not within the scope of Article II § 1, as amended by the 12th Amendment. To conclude otherwise would be to open the federal courts to a wide variety of controversies, for, under the same logic, almost any controversy can somehow be related to a general provision in the Constitution. The mere fact that this controversy centers around a preliminary process pertaining to the selection of the President without more does not confer jurisdiction over that controversy upon the federal courts.

This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If

it were, each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party or the convention. This is clearly a question of political party policy which is not justiciable, if at all, unless and until the Credentials Committee acts and then only if its actions violate fundamental constitutional rights.

The state election laws are applicable only to the extent that they regulate the manner of selection of delegates and are not applicable to their qualifications or eligibility to serve.

The several other grounds asserted by the defendants cannot support federal jurisdiction in the instant case since they can arise in the lawsuit only by way of defense and not from the complaint. *See,* Great Northern Ry. Co. v. Galbreath Cattle Co., and related cases cited *supra.* Undoubtedly, the issue of whether an order can be entered enjoining the defendants from pursuing what is seemingly a legitimate challenge to the Illinois delegation before the Credentials Committee without clearly violating defendants' 1st Amendment rights, as protected through the due process clause of the 14th Amendment against state interference, involves a federal question. Given the complaint in this case, however, that issue can only be raised by way of defense. Likewise, the underlying issues of whether certain allegedly underrepresented classes of people are being deprived of the equal protection of the laws and of protected voting rights can only be raised by way of defense.

We have considered other possible sources of federal jurisdiction and found them also lacking. First, the question of the relative supremacy of the rules of a national

political party vis-a-vis state law, which was alluded to in defendants' memorandum in support of its petition for removal, cannot support federal jurisdiction in the instant case. An alleged conflict between state law and the rules of a national political party is not tantamount to a conflict between state law and federal law. To hold that the complaint in this case necessarily involves the Supremacy clause of the Constitution, i. e., Article VI, would require a holding that the rules adopted by a political party are the equivalent of statutes passed by the Congress. Again, this is not to say that state law predominates over national party rules where they conflict. On the contrary, any attempt by an individual state to control a national convention of a party will necessarily fail due to the limits of its own jurisdiction.

The Texas White Primary Cases—Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953)—all involved federal courts asserting federal question jurisdiction over the state primary elections of local political parties. However, the complaints in those cases alleged racial discrimination in violation of the 14th and 15th Amendments which provided the federal jurisdiction. The Reapportionment cases, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) together with its predecessors and progeny, all involved allegations in the complaints of denials of equal protection or due process. No such allegations as in these two groups of cases are present in the instant complaint. Nor are there federal statutes which even tangentially could be applicable to the instant fact pattern. In addition, neither of the recent constitu-

tional amendments forbidding the imposition of a poll tax and providing for the 18 year old vote, both of which are applicable to primary elections, arise in this case by virtue of the complaint.

Accordingly, we find that § 1441 affords no basis for federal jurisdiction over the instant case for purposes of removal.

II. SECTION 1443

There are two possible bases for removal under this section.

1. *Subsection 1443(1).* This provision allows for removal of any civil or criminal action "against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens. . . ". This has been construed to mean that removal is allowed under this subsection only when it can be clearly predicted by operation of a pervasive and explicit law or pattern that federal rights will inevitably be denied by the very act of going to trial in the state court. Greenwood v. Peacock, 384 U.S. 808, 824, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966). Inasmuch as there has been no allegation that the defendants cannot raise their constitutional defenses and claims in the state court, and since it is clear that no constitutional deprivation will arise by merely defending the state action, removal is not proper under this subsection.

2. *Subsection 1443(2).* This provision allows for removal of any civil or criminal action "for any act under color of authority derived from any law providing for equal rights. . . ." In order for removal to be proper under this subsection, the defendants must have done some act about which they are about to be sued, that act must have been under color of authority of any federal law provid-

ing for equal rights, and the defendants must have been federal officers performing their duties under the above mentioned law. Greenwood v. Peacock, *supra*. In the instant case, there is no question that the defendants are being sued for an act which they have done and currently are doing—the presentation of a challenge to the uncommitted delegation to the Credentials Committee. With respect to the second requirement, defendants argue that it has been fulfilled since they are enforcing the McGovern Rules which do indeed deal with equal rights by providing for a more equal representation of the citizenry within the Democratic Party. Clearly, however, the McGovern Rules are not federal law, as has been discussed above. Moreover, the defendants are not federal officers. Their argument that by enforcing the McGovern Rules they are performing the essential duties of federal officers and therefore *are* federal officers hinges on the characterization of those rules as federal law. Inasmuch as such a characterization cannot be made, the defendants cannot be characterized as federal officers. Since the defendants are not federal officers enforcing federal law, removal is not proper under § 1443(2).

In brief summary, plaintiff's motion to remand the case to the Circuit Court of Cook County must be granted since there is no jurisdictional basis for this federal court to hear it. However, to say that this controversy in its present posture cannot be litigated and resolved in the federal court does not, as previously indicated, imply that it must, will, or can properly be resolved in the state court. That court faces serious jurisdictional difficulties as well and, even if those initial barriers are overcome, it is difficult to imagine any thoughtful court granting the type of relief requested in the instant case.

An appropriate order consistent with the foregoing will enter.

[*Filed July 5, 1972*]

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION
NO. 72 CH 2288

PAUL T. WIGODA, et al., Plaintiffs,

vs.

WILLIAM COUSINS, et al., Defendants.

DEFENDANTS' MOTION TO DISMISS, FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

NOW COME Defendants by their attorneys and move to dismiss Plaintiffs' complaint, to enter summary judgment in favor of Defendants and vacate any and all restraining orders heretofore entered and in response to Plaintiffs' motion for preliminary injunction and state as follows:

1. This case involves a contest over the certification of delegates to the 1972 Democratic National Convention which is scheduled to commence on Monday, July 10, 1972 in Miami, Florida.

2. The Credentials Committee of the 1972 Democratic National Convention has certified Defendants as delegates or alternates to the Convention from the 1st, 2d, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of Illinois.

3. The Credentials Committee certified the Defendants as delegates or alternates on June 30, 1972 and in so do-

ing adopted the findings of a special hearing officer, Cecil F. Poole, who after extensive hearings found that Plaintiffs had notoriously and openly violated numerous rules of the National Democratic Party. A copy of the Rules is attached hereto as Exhibit A and a copy of the hearing officer's findings adopted by the Credentials Committee is attached hereto as Exhibit B.

4. Defendants' right to participate in the 1972 Convention in accordance with the decision of the Credentials Committee, unless or until reversed by the Convention itself, is protected by the First and Fourteenth Amendments to the Constitution of the United States.

5. This Court has no jurisdiction to contravene the decisions of the National Democratic Party or the various Committees thereof including the Credentials Committee.

6. This Court is without jurisdiction to act upon Plaintiffs' amended complaint in that said complaint fails to name as a party defendant the National Democratic Party, any officer or committee thereof and particularly fails to name as a party defendant the Credentials Committee, the decision of which Committee the instant cause seeks to reverse.

7. The Court is without jurisdiction in that the same issues have been litigated adversely to Plaintiffs in another case. Thomas Keane, another member of the class Wigoda represents, in a similar class action unsuccessfully sought to reverse the decision of the Credentials Committee. Said decision was rendered by the United States District Court for the District of Columbia on July 3, 1972. The attorneys for Keane, et al. were and are the same attorneys as the attorneys for Wigoda.

8. Contests over the seating of delegates to National Political Party Conventions raise non-justiciable political questions and this court is wholly without jurisdiction with respect to the subject matter of such controversies.

9. Plaintiffs' complaint fails to state a cause of action upon which relief can be granted.

Andrew J. Leahy
Andrew J. Leahy and Mary Lee Leahy
Attorneys For the Defendants

AFFIDAVIT

Andrew J. Leahy herein first duly sworn states that the factual matters set forth in the foregoing motion are true and accurate.

Andrew J. Leahy

SUBSCRIBED AND SWORN to
before me this 5th day
of July, 1972.
Lawrence A. Poltrock
Notary Public
(Notary Seal)

[*Exhibit B to Motion to Dismiss, Filed July 5, 1972*]

FINDINGS AND REPORT
of
CECIL F. POOLE
Hearing Officer
Submitted to the Credentials Committee of the
1972 Democratic National Convention.
June 25, 1972

• • • • •

On May 26, 1972, the Honorable Patricia Roberts Harris, Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention, appointed the undersigned to act as Hearing Officer in the challenges filed against 59 of the Delegates and all 31 of the Alternate Delegates elected at the March 21, 1972 Primary in the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Congressional Districts of the State of Illinois.

Hearings were conducted in Chicago on May 31 and June 1, and again on June 8, 1972.

Both sides were represented by counsel and in person. Evidence, both oral and documentary was received, and the proceedings were reported by certified Court Reporters and their transcripts approximating 2,000 pages have been received and read. More than 500 exhibits, including affidavits and other documents, were introduced.

The Hearing Officer has weighed and considered all the evidence together with the inferences therefrom and does hereby first make the next-following Summary of Findings and then his Report to the Committee, as follows:

SUMMARY OF FINDINGS:

The Hearing Officer FINDS:

I. *Guideline A-5*

That the procedures by which the challenged delegates and alternates were selected in the Illinois Primary on

March 21, 1972, violated in substantial respects the provisions of *Guideline A-5* in that the Democratic Party of Illinois did not at the time of the election have in effect explicit written rules, available and readily accessible, covering the delegate selection process, so drafted and publicized as to facilitate maximum participation among interested Democrats, and providing full information as to dates, times and places of meetings involved in the process.

That as a result, persons not already of the party organization, not familiar with or privy to the channels of intra-party communication and the usages of party power and structure, had little opportunity to participate, to be heard, or even to be aware of the times and steps at and by which critical decisions and selections came into being.

That the challenged slate of delegates was selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago and specifically and clearly identifiable as the party apparatus in Congressional Districts 1, 2, 3, 5, 7, 8, 9 and 11, to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate.

That the absence of plausible explanation as to the actual mechanism by which the prevailing slate of candidates was in fact assembled, contrasted with the evidence, abundant and probative, that their names then appeared upon sample ballots and slates without internal dissent among the 40 Ward and Township Committeemen and other party regulars making up the list, and thereafter supported, distributed and urged by party workers and officials, leads to the

ineluctable conclusion that these were foreordained results of the violation of the requirements of openness and public involvement.

II. *Guideline C-4*

Guideline C-4, "Premature Delegation Selection (timeliness)", forbids Democratic Party echelons from practices by which officials elected or appointed before the calendar year of the convention either choose or endorse a slate of delegates. This rule was violated in letter and spirit in that there was a clear concert of act and deed among officials of the regular party organization in Chicago (none of them elected in the 1972 calendar year or for slate-making purposes), to accomplish the private selection of delegates; thereafter, to put the full weight, authority, prestige and support of the organization behind the candidacies of those thus chosen; and to discourage or to render ineffective parallel efforts by those outside the protective penumbra of the party's influence.

III. *Guideline C-6*

That the violations set forth as to Guidelines covering openness and timeliness involved for the same reasons a violation of C-6, slate-making, and that the violations of C-4 and C-6 were deliberate, covert and calculated.

As a result of the above, the Hearing Officer further FINDS:

IV. *Guidelines A-1 and A-2*

That the combination of the violation of the rules relating to procedure, notice, openness, timeliness and slate-making resulted in the election on March 21, 1972 of 59 of the organization's 62 slated delegates and of all 31 of its offered alternates; and that this produced a proposed delegation in which ethnic and racial minorities—Blacks and

Latin Americans and women and young people under 30, were grossly underrepresented in disregard of the clear purpose of Guidelines A-1 and A-2.

In reaching this conclusion, the Hearing Officer has rejected the suggestion that the convention will, or that the rules should be interpreted to, impose—as the challengers seem to imply—upon the Democratic Party a commitment to a quota based upon or approximating group proportions in the general population. Any such principle would be encumbered by grave doubt in any case, but its application here is unnecessary because the underrepresentation found was so extreme as to indicate (with a high degree of conviction) that the Party has failed in its basic obligation to open up to fuller participation by those who have historically been excluded, as intended by the Guidelines and the Call of the 1972 Convention.

It is true that the Guidelines for Hearings, Rule 7(a), provides that upon a showing of underrepresentation, the burden is shifted to the challenged to show that "appropriate" action was taken to achieve the "proper" representation. The Hearing Officer interprets this rule simply as a procedural device requiring the party to come forward and demonstrate affirmatively its bona fides in opening the heretofore closed portals and in inviting the outsiders in, and views it in the light of all the other circumstances and human motivations which bear upon the invitation and its disposition.

The challenged in this case have not sufficiently gone forward with the burden of that issue.

Analysis of the Challenges

1. The Challengers, ten in number, residents of Illinois and members of the Democratic Party, contest the seating at the 1972 Democratic National Convention of 59 persons

seeking to be seated as "uncommitted" delegates and 31 persons seeking to be seated as "uncommitted" alternates, as the successful candidates from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts, lying in whole or in part within the City of Chicago, Cook County, Illinois, all of whom were elected at a primary held March 31, 1972. The names of the challenged parties and of the challengers appear in the record.

2. The 59 challenged delegates represented include all but three of the successful candidates at the primary election in the above eight districts. The three additional elected delegates and three additional elected alternates, not under challenge, were committed to the candidacy of Senator Edmund Muskie.

The challenge is based upon the allegation of violations of Guidelines A-1, A-2, C-1, C-4 and C-6 of the Report of the Commission of Party Structure and Delegate Selection to the Democratic National Committee as they have been incorporated into Article III, Part I, of the Call of the 1972 Democratic National Convention.

The challenge claims violations of the guidelines in two major respects:

1. Minorities (including Latin Americans and Blacks), women, and persons between 18-30 are grossly underrepresented among the proposed delegates and in all Chicago Democratic Party affiairs (A-1 and A-2); and

2. The proposed delegation as to delegates and alternates was slated, endorsed and supported by the Democratic Party organization of Chicago without open slate-making procedures, without public rules relating thereto, and by Party officials who had themselves been chosen prior to 1972.

The Guidelines Provisions In Question

Guideline A-1 refers to the resolution adopted at the 1964 National Convention conditioning the seating of delegates at future conventions on the assurance of non-discrimination in any State Party on account of race, color, creed or national origin. In describing the adoption by the 1968 Convention of that 1964 Resolution and the inclusion of the same in the Call of the 1972 Convention, the guideline refers also to the adoption by the Democratic Convention in January 1968 of six anti-discrimination standards ("the Six Basic Elements") for parties to meet. All of the above was designed to insure full opportunity for all minority groups to participate in the delegate selection process to supplement which the Commission requires that:

1. State Parties add the Six Basic Elements to their party rules and take appropriate steps to secure their implementation;

2. State Parties overcome the effects of past discrimination by affirmative steps to encourage minority group participation, including representation of minority groups on the delegation "in reasonable relationship to the group's presence in the population of the state".

A footnote states that this is not to be accomplished by the mandatory imposition of quotas.

Guideline A-2 states that discrimination on the grounds of age or sex is inconsistent with the full and meaningful opportunity to participate in the delegate selection process. The Commission requires State Parties to eliminate such discrimination and to overcome the effects of past discrimination by affirmative steps to encourage representation on the delegation of young people (18-30) and of women in reasonable relation to their presence in the population of the state.

Again, the footnote cited states that this is not to be accomplished by the mandatory imposition of quotas.

Guideline A-5—*Existence of Party Rules*

Requires State Parties to adopt and make available the rules relating to the delegate selection process; to adopt rules which will facilitate maximum participation among interested Democrats in that selection process and specifically providing for dates, times and public places of meetings.

The Commission also requires State Parties to adopt rules which will facilitate maximum participation among interested Democrats in the selection process.

Guideline C-1—*Adequate Public Notice*

The rule requires state parties to assure voters an opportunity to "participate fully" in party affairs. This includes adequate public notice including the publicizing of time, places and rules for the conduct of all meetings of the party. Parties are also required to circulate concise and public statement in advance of the election itself on the relationship between the party business to be voted upon and the delegate selection process.

Guideline C-4—*Premature Delegate Selection* (Timeliness)

The Call to the 1972 Convention includes the requirement that the delegation selection process must begin within the calendar year of the convention. The guideline provides that the practice by which state chairman, state, district or county committees select, or chose agents to select, the delegate is inconsistent with the Call; that the rule prohibits any untimely procedures which have any direct bearing on the processes by which National Convention Delegates are selected, and the process by which the delegates are nominated is such a procedure. Therefore, parties are prohibited from practices by which party officials

elected or appointed before the calendar year chose nominating committees or propose or endorse a slate of delegates—even when the possibility for a challenge to such slate or committee is provided.

Guideline C-6—*Slate-making*

The process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected and parties are required to extend to the nominating process all guarantees of full and meaningful opportunity to participate in the delegate selection process.

Whenever slates are presented to caucuses, meetings, conventions, committees or to voters in a primary the rule requires that the party have adopted procedures which assure:

1. That the bodies making up the slates have been elected, assembled or appointed for the slate-making task with adequate public notice that they would perform such task;
2. That the persons making up the slate have adopted procedures which facilitate wide-spread participation in that process;
3. That there be safeguards provided to assure that the right to challenge the presented slate is more than perfunctory.

THE EVIDENCE

A. *The Party Structure*

The Democratic Party organization in Cook County, Illinois is headed by the County Central Committee consisting of the 50 Chicago Ward Committeemen and 30 Township Committeemen for a total of 80. The chairman, currently

the Mayor of Chicago, is chosen by the committee members and in turn appoints an Executive Committee (RT 825). The nominal parent organization is the Illinois State Central Committee which has 24 members, one for each congressional district, is invested by law with certain general oversight of party affairs in Illinois. The testimony showed that the slating of candidates has historically been carried out as a joint function of the State Central Committee along with a group selected by the Chairman of the Cook County Central Committee. The State Committee was not shown to exert substantial control over the affairs of the County Committee. In Cook County precinct captains in each ward are appointed by the committeeman from that ward. Under them are hundreds of precinct workers who in former days were beholden to the committeeman for jobs and other political emoluments. The precinct captain keeps track of voters and of general precinct affairs. They hold jobs such as clerks, elevator operators, sewer and building inspectors, etc. They are not civil service, and when there is a turnover in a political job-dispensing office, these people lose their jobs. A witness described this as "patronage jobs". (RT 861) Although there was testimony that a recent court decision resulted in an order banning certain types of patronage manipulation, the evidence is clear that the practice still thrives.

Meetings of the Cook County Central Committee are not usually preceded by public notice although some are and the public and press may attend when certain statutory functions are being conducted. Meetings held for the purpose of selecting and endorsing candidates for public office are not open until after the decision has been made, at which time the endorsed candidates may be brought in and

introduced to the persons present (RT 829). The same general procedure has in the past been applicable to the slating of congressmen and delegates to the National Convention. Selection of congressmen has apparently been an harmonious and cooperative procedure. Theoretically the selection is made by the vote of the ward and township committeemen, each casting the number of votes equal to the votes cast in his ward or township in the last preceding election. The testimony was that in fact a consensus is usually arrived at quickly in the case of congressmen (RT 832).

Under the old procedure for the selection of delegates to the National Convention, two were formerly elected from each Congressional District and a larger number selected at large in convention. One witness, involved and experienced in party affairs, testified that the general pattern was for the ward committeemen in the district to rotate with each other from one convention to the other in filling the 48 convention delegates leaving 60 or 70 seats to be appointed by the State Convention; that those selected were typically office holders and party officials (RT 835). There were formerly no written party rules covering the whole process. It was shown that the Democratic Party in Illinois introduced in the legislature in 1971 a number of statutory measures designed to bring the election code of Illinois into conformity with the spirit and the letter of the Commission guidelines. These efforts were effective, (1) in permitting for the first time the candidate for delegate to state his preference or to list himself as uncommitted; (2) in changing the formula by which delegates were apportioned so that each congressional district was apportioned based on its population and the vote cast by it in the

preceding presidential election; and (3) finally to move into the current year of the convention the deadline for filing candidates for delegate. In addition to that. the Democratic Party of Illinois finally adopted written rules which became effective in April 1972 but not effective at the election which is here under contest.

B. *The Chicago Party Organization and the Selection of Candidates in Chicago*

In former times selection of candidates for delegate and alternate was accomplished by the party organization through slating procedures now forbidden by the guidelines. There was testimony and substantial evidence and the hearing officer finds that the 59 challenged delegates were selected by procedures which in major part still reflected the forbidden slating method and in major part too was arrived at out of public view but with the unmistakable indicia of clear understanding and mutual cooperation among all the echelons of Cook County organization from the Chairman down through the Ward Committeeman.

There was testimony that at a meeting prior to the election, the Chairman, adverting to the guidelines, stated in a committee meeting that the delegates would be elected as they always had been (RT 847); that he "didn't give a damn" about the [McGovern] rules (RT 1016).

There was testimony that a candidate for delegate had expressed a desire to list a preference for president and requested permission from the Chairman to run committed to that candidate, but was told by the Chairman that the organization had to "stay together on this" (RT 858).

A Chicago Alderman, himself a challenged delegate testified for the challengers (requiring therefore, in the Hearing Officer's judgment, careful scrutiny of motive and bias but eventually given probative value). He stated positively

that a closed meeting of the Party members in Chicago was convened on February 24, 1972 following a meeting of the County Central Committee; that there was discussion by the Chairman about the need for making it clear just who were the organization-supported candidates; and insisting that the organization had the right "to express its views on the selection of delegates" (RT 1013-1018).

The same witness testified that in December 1971 he had been invited to attend a luncheon of organization members at which delegates to the convention from the 9th Congressional District were to be discussed (RT 1067). The witness declined the invitation and a counter-affidavit (Exhibit 18-10) by Scott Hodes (from whom the invitation issued) describes the luncheon as simply a "Christmas Party Luncheon get-together" for the Democratic Committeemen at which no discussion concerning delegates took place.

In an affidavit (Exhibit 7-5) Alderman William Singer related a conversation held on January 8, 1972 with Mr. John Merlo (44th Ward Regular Democratic Committeeman) about candidates for the 9th Congressional District. According to the affiant, Merlo told him that the "Regular Organization" was going to slate Messrs. Huppert, Hartigan, Wigoda, Tuchow, Hodes, Lerner and Ms. Hedlund. The affidavit continues:

> "* * * When I indicated that that was only seven and there were eight candidates to be elected, Mr. Merlo turned to Judge Kenneth Wendt and said, 'Who's that other candidate that Danny O'Brien [44th Ward Alderman Daniel P. O'Brien] put up for delegate?' Mr. Merlo then answered his own question by saying, 'I think he's a young kid named Paul Stepan, but I don't know him'. Mr. Merlo then also indicated that Steven Yates had been 'put up' for the position of alternate delegate."

Mr. Merlo has filed a counter-affidavit (Exhibit 18-22) confirming that a conversation was held but stating:

> "* * * Alderman Singer asked if I knew who the delegates would be and I answered I did not.
> "I do remember Judge Wendt saying he hoped that a fine young man like Steve Yates would run, and I replied that if he did, I sure would like to see him win.
> "No slate of names were mentioned as I had no knowledge of who the delegates would be."

It is the fact that thereafter the names of all those mentioned in Alderman's recital, above, appeared on the sample ballots for the 9th District.

Eventually there emerged slates of delegates in each congressional district supported by the identifiable party organization and structure. The Chairman, Mayor Daley, and 37 of the 50 Chicago Ward Committeemen were on the slate plus 3 of the committeemen who filed for the position of delegate appeared on the sample ballots distributed by the organization. Many of the other slated candidates are identifiable as persons connected with the organization, such as the County Clerk, the Sheriff of Cook County, the President of the Chicago City Council, in-laws or relatives of committeemen, the son of Chairman Daley, other party officials, party candidates for public office and persons described as "confidantes" of the Chairman or otherwise affiliated with the Democratic organization. In no district did more ward committeemen and other organization officials file than were delegate positions available. In each case, prior to the March 21, 1972 Primary Election, precinct party workers circulated in all the Congressional Districts the sample ballots and slates, by whomsoever ordered, on which candidates supported by the organization were named with an "X" in the boxes opposite their names while all

other candidates (i.e., those not supported by the organization), were un-named and identified only as "other candidate".

Abundant evidence in scores of affidavits (see Exhibits 4-1 through 4-46) established that precinct workers throughout the challenged districts distributed these same ballots to residences, offices and on the street, and that they urged the support of the persons listed as the "organization" or "machine" candidates, and generally conveyed the message that the regular party organization in Chicago had and was supporting its own slate of candidates for delegate and supported none other.

Other affidavits (Exhibits 5-1 through 5-48) disclosed a wide-spread pattern of Primary day electioneering by precinct workers who checked to see that voters had brought the sample ballots with them to the polls, and who urged such voters to vote the straight organization supported tickets.

Counter-affidavits—of which Exhibits 14-10 (Congressman George W. Collins), 14-11 (Illinois House of Representative Isaac Sims) and those of Delegates Neil Hartigan (18-3), Jerome Huppert (18-5), Marilou Hedlund (18-8), are among the many which have been read and considered. They detail each affiant's account of the manner in which she or he came to run for the position of convention delegate and in general show impressive histories of party service and interest. Some of the office-holders invoke the aspect of name-recognition as accounting for their success on March 21; each insisting that his decision to run was arrived at independently without reliance upon any commitment by the regular party organization or party officials. Their reconciliations of the appearance of their respective names on the sample ballots are not as specific as are their

denials of concerted action. Mr. Sims did assert in his affidavit that he ordered the printing of sample ballots and that he did so;

> "• • • because he was requested to do so by many of his friends living within the 28th Ward. He further states that he listed seven other delegates on the sample ballot because, in his opinion, a sample ballot with only his own name listed with an 'X' would mislead voters so that only one vote would be cast when each voter had the right to cast ballots for eight individuals running on the official ballot. It was his opinion that if he marked only one 'X' he would in effect, be disenfranchising such persons from seven of their votes. He listed as persons also recommended on the slate, friends of his who were running as uncommitted Delegates because those persons listed on the ballot with a presidential preference did not reflect his personal preference for the nomination of the Democratic candidate for President in 1972."

From the mass of sharply conflicting evidence, there emerges a clear pattern of concerted action by the organization in the use of its influence and prestige in support of its regulars, encouraging their candidacies, agreements on numbers, cooperation in the preparation of sample ballots, their widespread distribution by party workers, their prominence at headquarters of ward officials, and the formidable array of party power in behalf of its preferred candidates.

All of this compels the irrefragable conclusion, and the Hearing Officer finds, that Guidelines C-1, C-4 and C-6 have been violated in the nomination and election of the challenged delegates and alternates in Chicago.

C. *Composition of the Chicago Delegation*

The most immediately remarkable feature of the delegation under challenge is its impressive collection of Ward

and Township Committeemen, 40 in number, along with the Secretary of the Cook County Central Committee and headed by the Chairman, Mayor Daley. This appears in Exhibit "A" to this report. Only one of these is a woman—Ward Committeewoman Lillian Piotrowski.

A document entitled "Official Results of Votes Cast in Cook County Primary Election held Tuesday, March 21, 1972" which was issued by the County Clerk of Cook County, was admitted into evidence as Exhibit 2 (b). It sets forth the votes received by each candidate in each of the eight Congressional Districts involved in this challenge, and is attached to this Report as Exhibit "B".

During the testimony of Pierre De Vise (RT 1274-1331), a City Planner and Demographer called on behalf of the challengers, the exhibit was given symbols to identify, as far as possible, each of the elected Delegates and Alternates as belonging to the groups referred to in Guidelines A-1 and A-2. The symbols used, as seen on this current Exhibit "B" are:

F — Female
B — Black
LA — Latin-American
Y — Young (18 to 30)

These figures are considered against a backdrop of the evidence produced in the testimony of witness De Vise. He introduced 1970 Census figures for Chicago which put the 1970 total population at 3,355,000 of which approximately 33% were Black and 9% Latin American. (RT-1275 et seq.). It was the witness's testimony that this represented an undercount of 10% for both ethnic groups; that by March 1972 Blacks constituted 37% of the Chicago population (1,323,000), while Latin Americans constituted 10% (320,000).

He placed the presence of women in the population at 52%, and of those between the ages of 18 and 30 at 30%, although he did not break down the cohort of those in the respective sex-age ethnicity categories. [To some extent we have refined the breakdown in the charts, infra.]

By Congressional District he estimated the Latin American and Black population totals and percentages as follows:

District	Black Number		%	Latin American Percentage Only
First	411,599	—	89%	0%
Second	184,376	—	45%	07%
Third	24,075	—	06%	0%
Fifth	145,254	—	34%	10%
Seventh	255,230	—	59%	19%
Eighth	83,109	—	20%	18%
Ninth	21,287	—	04%	12%
Eleventh	927	—	0%	02%

Combinations of the symbols have been employed as indicated. The breakdown of the elected delegates pursuant to the symbol is:

Delegates:

District	F	B	LA	Y	FBY	F/LA	F/LA/Y	BY	LA/Y	FY	FB
1st		5			2						
2nd		1		1							
3rd											
5th	1	1		2							1
7th		2									
8th				1	1	1	1				
9th	3			1							
11th											
Totals	4	9		5	3	1	1				1

Alternates:

District	F	B	LA	Y	FBY	F/LA	F/LA/Y	BY	LA/Y	FY	FB
1st		2									
2nd		2	2								
3rd	2										
5th	1	1									
7th		1				1					
8th	1	1									
9th			1							1	
11th										1	
Totals	4	7	3			1				2	

The challenged delegation includes nine male and three female Blacks for a total of 12;

four Caucasian females;

two Latin-American females; and

five Caucasian youths under 30.

The inclusion of only nine females out of 59, given the proportion of women (of all ages, color, creed and races) in the general population, is suspicious at best. It would not, however, be proof of actual discrimination by itself. But to this must be added the testimony of the former President of the League of Women Voters, Mrs. Jeannette Stessl (RT 649-710), that in her extensive experience there had been little or no effort made by the organization to really involve women in important and meaningful activities of the party. She further testified that a party worker visited her home prior to the 1972 primary and brought a sample ballot which he urged her to follow. Mrs. Stessl inquired as to why there were so few women listed and whether this activity did not violate the guidelines. The worker, an Assistant States Attorney in Cook County, responded that he did not know what the guidelines were but that anyway, "they'll fix that up in Miami". (RT 664). He also said that women didn't belong in politics.

Whether the above remarks reflect party feelings or were simply the utterances of a political journeyman, it is a fact that the delegation is grossly underrepresented not only as to women but also (with the outstanding exception of the 1st Congressional District and to a lesser extent the 9th) as to Blacks, the young and Latin-American citizens.

In view of the discussion and findings with respect to Part B, above, as to the role of the party structure in the delegate selection process, the Hearing Officer concludes that the selectivity which so heavily favored entrenched office-holders and regulars was also operative in the choosing of women, the young, and racial minorities, and that it discriminated against them invidiously and substantially. This is not because such persons have a legitimate claim to party office and perquisites on a mathematical or proportionate basis. Many other factors combine to affect that result: interest, capacity, loyalty, name-recognition, popularity, and the like. And eventually, by virtue of all these elements, and oftentimes despite them, the ultimate judges—the electors—give their own impeccable verdict in the secrecy of the voting booth.

The Hearing Officer concludes, and finds, that the underrepresentation complained of was not the result of fortune, unaffected by the efforts of the organization, but was a continuation of the same conditions exposed in the Commission Report and came about because, although diligent in including its own regulars, the organization in Chicago expended no such resources on the segments of the population as required by Guidelines A-1 and A-2.

The Hearing Officer accordingly finds that those Guidelines have been violated both in letter and in spirit.

CONCLUSION

For the reasons hereinabove set forth, the Hearing Officer finds and reports to the Credentials Committee of the 1972 Democratic Convention that in the election of Delegates and Alternate Delegates in the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Congressional Districts of the State of Illinois, Guidelines A-5, C-1, C-4, C-6 were violated and thereafter Guidelines A-1 and A-2 were also violated.

Respectfully submitted, June 25, 1972,
Cecil F. Poole
Cecil F. Poole, Hearing Officer

[*Exhibit to Report of Proceedings in Circuit Court of Cook County, July 8, 1972*]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 72-1628
WILLIE BROWN, ET AL., Appellants
v.
LAWRENCE O'BRIEN, ET AL.

No. 72-1629
THOMAS E. KEANE, ET AL., Appellants
v.
NATIONAL DEMOCRATIC PARTY, ET AL.

No. 72-1630
THOMAS E. KEANE
v.
NATIONAL DEMOCRATIC PARTY,
ET AL., Appellants

No. 72-1631
THOMAS E. KEANE, ET AL.
v.
NATIONAL DEMOCRATIC PARTY, ET AL.
WILLIAM COUSINS, ET AL., Appellants

On Appellants' Motions for Summary Reversal

Decided July 5, 1972

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and MACKINNON, *Circuit Judge*.

Opinion of Court of Appeals for the District of Columbia

Per Curiam: These two cases, which have come before us on motions for summary reversal and expedited consideration, call into question the power of the Democratic Party to exclude from its 1972 national convention certain challenged delegates from California and Illinois. In both cases delegates unseated by action of the credentials committee of the national convention assert that they were expelled in violation of rights guaranteed by the Constitution. The district court dismissed the complaints in both cases, upholding the action of the credentials committee. In No. 72-1630 we affirm the district court's judgment dismissing the complaint of Illinois plaintiffs, and, for the reasons set forth below, we remand the case to the district court for entry of an order barring these plaintiffs from taking action in any other court that would impair the effectiveness and the integrity of the judgment of this Court. In No. 72-1628 we reverse the judgment of the district court and remand the case to that court for entry of an order declaring defendants' action null and void, and enjoining defendants from excluding these elected California delegates because of their selection in a winner-take-all primary.

I.

The California Challenge

California plaintiffs are 151 persons who ran in a statewide primary election on June 6, 1972, as part of a 271 person slate committed to the presidential candidacy of Sen. George McGovern of South Dakota. Sen. McGovern won the California primary with a plurality of the vote, roughly 43 per cent, and under the winner-take-all provision of the California primary election law,[1] the entire

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[1] *See* Calif. Elections. Code §§6300-93, and in particular §6386.

271 person slate was designated as the California delegation to the national convention. A challenge was then brought against the California delegation on the grounds that the winner-take-all feature of the California primary law was invalid under rules adopted by the Democratic Party in 1971—the so-called McGovern Commission guidelines. The hearing examiner appointed by the credentials committee rejected the challenge and it was renewed before the full committee on June 29, 1972. At that time the challengers apparently dropped the allegation that winner-take-all was inconsistent with the McGovern guidelines, and maintained that it violated the mandate of the 1968 convention. With California's representatives on the credentials committee not voting, because their delegation was under challenge, the credentials committee passed by a six vote majority the following resolution:

WHEREAS the 1968 Convention guaranteed to all Democrats, a "full, meaningful and timely opportunity" to participate in the delegate selection procedures of our party, and

WHEREAS the California winner-take-all primary election held on June 6, 1972 denied that opportunity to participate to almost two million Democratic voters, and

WHEREAS the California winner-take-all primary functionally disenfranchised 56% of the California Democratic electorate who did not vote for George McGovern, and

WHEREAS the California winner-take-all primary awarded 100% of the delegate votes of the State of California to the McGovern slate, while awarding no delegates to other candidates who received votes of California Democrats—Humphrey, Muskie, Wallace, Chisholm, Jackson, McCarthy, Lindsay and Yorty,—in spite of the fact that proportional representation is an integral party of the 1968 reform mandate of the Democratic National Convention, and

WHEREAS a majority of the California Democratic electorate will have no representation or voice in the 1972 Democratic National Convention under the proposed California delegation of Senator McGovern, in contradiction to the entire thrust and spirit of Party reform in the Democratic Party over the last four years, now therefore,

BE IT RESOLVED by the Credentials Committee of the 1972 Democratic National Convention, that the California delegation not be seated as presently constituted, that a delegation apportioned on the basis of proportional representation be substituted in its place, that the formula for this representation be directly proportional to the votes cast by the Democratic voters of the State of California in the June 6, 1972 primary, that this voting results in the election of 106 Humphrey delegates, 16 Wallace delegates, 12 Chisholm delegates, 6 Muskie delegates, 4 Yorty delegates, 3 McCarthy delegates, 2 Jackson delegates, 2 Lindsay delegates, and 120 McGovern delegates, and the appropriate number of alternate delegates in all cases, and

BE IT FURTHER RESOLVED that those delegate positions be filled by an open and representative procedure—in the case of 120 McGovern delegates, a caucus of the 271 individuals on the McGovern slates, for all other candidates with the exception of Governor Wallace, a caucus of the respective California slates, and for the Wallace positions, an open caucus to be held in the State of California, with adequate public notice, not later than July 5, 1972, that all delegates included on the California delegation as reconstituted be selected consistent to the A1 and A2 provisions of the Call for the 1972 Democratic National Convention which calls for reasonable representation of women, youth and minorities, so that the % of these groups, blacks and chicanos does not de-

crease, and that the names of all members of this newly constituted and equitable California delegation be presented to the Secretary of the Democratic National Committee before July 7, 1972 who will certify such names as the California delegation to the 1972 National Convention.

In their complaint, the excluded California delegates assert that their expulsion was in violation of, inter alia, their constitutional right to due process of law. We have no difficulty concluding that defendants' action against these delegates was state action. See Terry v. Adams, 345 U.S. 461 (1953); Georgia v. National Democratic Party, 447 F. 2d 1271 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 858 (1971). We also conclude, for the reasons described below, that expulsion of these 151 California delegates was inconsistent with fundamental principles of due process.

At the heart of the controversy in these two cases are the guidelines on delegate selection promulgated by the McGovern Commission in April, 1970, and adopted by the Democratic National Committee in February, 1971. One of these guidelines, B-6, deals with the representation of minority views on presidential candidates at each stage of the delegate selection process. That guideline urges State Parties to adopt procedures which will provide fair representation of minority views. But the guideline explicitly stops short of abolishing the winner-take-all provision. Thus, the examiner who initially heard the challenge to the California delegation made findings as follows:

4. The parties stipulated during the hearing that the McGovern Commission gave full and careful consideration to requiring the abolition of the winner-take-all concept at least at the state level, and decided not to make its abolition mandatory. The other evidence presented at the hearing confirmed this stipulation.

5. The language of Guideline B-6 itself supports the stipulation. In contrast to other Guidelines, it uses the word "urges" instead of the word "requires" with respect to the proceedings specified.

Plaintiffs also submitted an affidavit indicating that at a meeting of the McGovern Commission on November 19, 1969, a Commission member proposed that the guidelines "require" the abolition of winner-take-all provisions for 1972. The proposal was apparently defeated by a vote of 13 to 3. The understanding that winner-take-all was still a viable concept for the 1972 convention was also reflected in *The Call for the 1972 Democratic National Convention.* The Call incorporates the resolution of the Democratic National Committee adopting the McGovern guidelines, and it reiterates the distinction between guidelines which the state parties are "required" to adopt, and those which they are "urged" to adopt.

The hearing examiner also found that the State Democratic Party of California relied on representations made by authoritative spokesmen for the national party. The examiner indicated that:

6. Congressman Donald A. Fraser and Robert Nelson of the Commission on Party Structure and Delegate Selection testified to negotiations with the California Democratic Party on compliance with the Guidelines. With respect to B-6 their testimony was that although California was urged in the early part of the negotiations to take steps to abandon the winner-take-all primary, it was assumed at all times that that was not a requirement for compliance with the Guidelines for the 1972 Convention.
7. The final letter from Congressman Fraser to Mr. Stephen Reinhardt of California, dated April 28, 1971 (Challengers Exhibit G) states (page 2):

"Although Guideline B-6 'urges' state parties to adopt procedures which provide for

fair representation of minority views on presidential candidates, it does not require that the winner-take-all statewide primary be abolished in selecting delegates. Therefore it is permissible to use this system in California in 1972."

8. In a letter dated February 1, 1972, (Respondents Exhibit 5) from Lawrence O'Brien to Mr. Charles T. Manatt, Democratic State Chairman, Mr. O'Brien said that "the Fraser Commission informs me that the California Party is in full compliance with the Guidelines." This was confirmed in a similar letter to Mr. Manatt, dated February 7, 1972, from Robert W. Nelson, Staff Director of the Commission (Respondents Exhibit 6).
9. The evidence establishes that all interested persons and organizations, including the candidates, acted in reliance on the fact that Guideline B-6 did not outlaw the winner-take-all statewide primary as a method of delegate selection in 1972.

Conceding no support for their action in the Call to the Convention or the McGovern guidelines, defendants would justify the expulsion of these plaintiffs solely on the Credentials Committee's construction of the resolution adopted by the 1968 national convention. That resolution, which initiated the process of reform and provided the mandate of the McGovern Commission's action, stated:

> Be it resolved, that the call to the 1972 National Democratic Convention shall contain the following language:
> It is understood that a State Democratic Party in selecting and certifying delegates to the National Convention thereby undertakes to assure that such delegates have been selected through a process in which all Democratic voters have had a full and timely opportunity to participate.

> In determining whether a state party has complied with this mandate, the Convention shall require that:
> (1) The unit rule not be used in any stage of the delegate selection process, and
> (2) All feasible efforts have been made to assure that delegates are elected through party primary, convention or committee procedures, open to public participation within the calendar year of the National Convention.

Defendants now seek to characterize the action of the credentials committee as reflecting a determination that "insofar as Guideline B-6 permits the selecton of delegates on a winner-take-all basis, in disregard of the views of minorities within the state parties, it is invalid under the mandate of the 1968 Convention and therefore is of no force or effect." Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, July 3, 1972, at 38.

Plaintiffs respond—in our view, with great force—that nothing in the 1968 resolution can reasonably be seen as a prohibition of winner-take-all provisions. They point out that (1) the resolution specifically bars the unit rule, but makes no mention of the winner-take-all concept; (2) the resolution has been consistently interpreted since 1968 as not requiring abolition of winner-take-all, and assurances to that effect were repeatedly offered to the California state party; (3) the 1968 *Report of the Commission on the Democratic Selection of Presidential Nominees* (Hughes Commission), a critical part of the "legislative history" of the 1968 resolution, gives no indication that abolition of winner-take-all was a part of the 1968 reform package. On the contrary, while laying the groundwork for the convention resolution and the McGovern Commission, the report of the Hughes Commission clearly states that:

> [t]he Commission does not, however, flatly condemn the winner-take-all principle in state primaries, since such primaries offer a useful device for engaging popular interest and involvement in the process of selecting a President.

Report at 19.

In resolving this question we begin with a firm conviction that the political parties must have wide latitude in interpreting their own rules and regulations. And we recognize that this latitude must be especially wide where, as here, a reviewing court is hampered by severe shortage of time which prevents a prolonged inquiry into the meaning of the rules. But on the basis of the record now before us and the argument we have heard, we are compelled to conclude: (1) that the provision of the 1968 resolution invoked to justify the exclusion of these delegates is vague and indeterminate—requiring this action, if at all, only by innuendo; (2) that nothing in the statements made at the time of the adoption of that resolution or in its subsequent interpretation by the Guidelines and party officials suggests that it was ever understood to enact a ban on winner-take-all; (3) that plaintiffs and the State of California acted in justifiable reliance on the continuously reiterated assurances of Democratic Party officials that winner-take-all was not proscribed; and (4) that the Democratic Party did not merely interpret one of its rules—in essence, it acted in defiance of its own rules as interpreted in the Call for the 1972 Convention by establishing retroactively an entirely new and unannounced standard of conduct.

The question remains, therefore, whether the Constitution bars the Democratic Party from changing the rules after the election has been held. We recognize that some consider the change adopted by the Party to be a laudable

one and the direction of recent attempts at Democratic Party reform is quite plainly toward the principle of proportional representation and maximum participation of minority views. But the process by which that result is reached is necessarily as important as the result itself. We cannot be blind to the fundamental deficiencies in the fairness of the process of reaching that result. Nor can we overlook the injuries to which those deficiencies gave rise.

If the party had adopted a ban on winner-take-all prior to the California primary election, the candidates might have campaigned in a different manner, devoting more or less time and resources to the state. Voters might have cast their ballots for a different candidate;[2] and the State of California might have enacted an alternative delegate selection scheme that would comply with party rules and that might be more responsive to its own state interests than the pure proportionality of representation that was imposed by the credentials committee.[3] The interests of the political candidates, the voters of California, and the State of California are plainly substantial, and the injury to these interests might itself require our intervention. But the fundamental basis of our action is the grave in-

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[2] It has been suggested, for example, that voters who cast ballots for one of the front runners in the race might have voted for another candidate if they had been aware that delegates would be divided in proportion to votes. Plaintiffs also suggest that certain presidential candidates may have dropped out of the race on the assumption that only the winner would be awarded any delegates.

[3] Thus, the State of California might have enacted a scheme whereby delegates are divided by congressional district, with all of the delegates for each district being awarded to the candidate who obtained the most votes in that district. See guideline B-6.

jury to the fairness and legitimacy of the process of electing the President of the United States. As a nation we can tolerate, and even welcome disputes about the merits of different rules which might govern the election of the President. It may well be, for example, that direct election of the President is more fair than indirect election by the electoral college, and that distribution of delegates in proportion to votes received by the candidates they represent is more fair than winner-take-all. These are questions about which reasonable men can differ. But there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force. The decision of the Party to exclude these 151 delegates, who were elected in compliance with each of the party's applicable rules then in force, jeopardizes the integrity of the election process, and it therefore injures every voter in the United States and every individual and institution which is subject to the authority of the President. Because we are convinced that the process of electing the President of the United States is not, and cannot be, placed outside the rule of law, we set aside the arbitrary and unconstitutional action of the Democratic Party.[4] The case is remanded to the

[4] Plaintiffs argue that their exclusion violated not only their rights to due process of law but also to equal protection of the laws. They assert that delegates from twelve states were selected pursuant to some variant of the winner-take-all principle, and they protest the application of this new rule against only the California delegation. In view of our resolution of the due process contention, we express no opinion on the merits of the equal protection argument.

district court for entry of an order declaring defendants' action against these plaintiffs null and void, and enjoining defendants from unseating these duly qualified and elected delegates to the national convention because they were selected in a winner-take-all primary election.

II.

The Illinois Challenge

The Illinois case involves a challenge to the seating of a group of 59 uncommitted delegates elected pursuant to state law, from various congressional districts in Northern Illinois.

After the Illinois delegate primary was held on March 21, 1972, a challenge was filed to the seating of the delegates in question on the ground that several of the guidelines of the Democratic National Party, promulgated by the McGovern Commission in April, 1970, had been violated. The complaint before the Credentials Committee was based on asserted violations of rules A-1, A-2, C-4 and C-6. These rules deal with the requirements that State Democratic Parties make the delegate selection process an open and fair one.

After a lengthy hearing, the Hearing Examiner selected by the Credentials Committee to hear the complaint issued findings of fact. His decision upheld the challengers' contention with respect to each of the guidelines in question. The Credentials Committee voted to accept the Hearing Examiner's report in total; to unseat the challenged delegates; and to seat an alternative slate of delegates.

This suit was thereafter instituted as a class action in the District Court, on behalf of the 59 challenged delegates and the voters they represent. The complaint sought to overturn the decision of the Credentials Committee on the grounds that its action violated the constitutional

rights of the 59 delegates.[5] The challenged delegates sought a declaration that each of the guidelines, as applied to them, was unconstitutional; and an injunction reinstating them as delegates to the 1972 convention.

After a hearing, the District Court denied the request for an injunction. In so ordering, the court found that the action of the Credentials Committee with respect to guidelines A-5 and C-6 did not pose any deprivation of constitutional rights. In addition, the Court readopted its findings of June 19, which had been vacated by this court on the ground of prematurity. See note 5 *supra*. Those findings held certain of the guidelines unconstitutional.

The Illinois delegation recognizes that in order to prevail, it must sustain its assertion that each of the grounds relied on by the Hearing Examiner, and in turn by the Credentials Committee, is unconstitutional. They have not met that burden. The District Court's determination that there exists a valid basis for the action of the Credentials Committee, insofar as it is based on Guideline C-6, is hereby affirmed.

Guideline C-6 states:

> C-6 Slate-making
>
> In mandating a full and meaningful opportunity to participate in the delegate selection process, the 1968 Convention meant to prohibit any practice in the process of selection which made it difficult for Democrats to participate. Since the process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected, the Commission requires State Parties to extend to the nominating process all guarantees of full and meaningful opportunity to participate in the delegate selection process. When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose.
>
> Furthermore, whenever slates are presented to caucuses, meetings, conventions, committees, or to voters in a primary, the Commission requires State Parties to adopt procedures which assure that:
>
> 1. the bodies making up the slates have been elected, assembled, or appointed for the slate-making task with adequate public notice that they would perform such task;
> 2. those persons making up each slate have adopted procedures that will facilitate widespread participation in the slate-making process, with the proviso that any slate presented in the name of a presidential candidate in a primary State be assembled with due consultation with the presidential candidate or his representative.
> 3. adequate procedural safeguards are provided to assure that the right to challenge the presented slate is more than perfunctory and places no undue burden on the challengers.
>
> When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose.

The process by which candidates for an office are endorsed can be just as integral a part of the ultimate election as is the election itself. The Supreme Court estab-

[5] The plaintiffs in this case had filed a suit in the District Court, seeking essentially the same relief as sought here, prior to the ruling of the Hearing Examiner. The District Court issued an order at that time which reached the merits of the constitutional claims raised in the complaint. On appeal, this court vacated the District Court's order on the ground that because no action adverse to plaintiffs had yet been taken, the suit was premature. The case now under consideration was consolidated by the District Court with the prior suit. Since the Credentials Committee has already acted, the controversy is now ripe for adjudication.

lished that principle in Terry v. Adams, 345 U.S. 461 (1953), and it applies as well with respect to the process for choosing convention delegates. The Democratic National Party determined to make participation in the nomination process as democratic as possible. This exercise of the Party's power over the qualifications of the delegates to its convention was pursuant to a reasonable regulation calculated to achieve a permissible, indeed laudable, end. The action of the Credentials Committee was taken on the basis of a clear and constitutional rule which avoided the problem of vagueness found in the application of Guideline B-6 or the mandate of the 1968 convention to ban 'winner take all' primaries. Moreover, this rule had been announced—and understood—as applicable to the selection of delegates prior to the election process.

The challenged delegates claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the challenged delegation. No violation of Illinois law is at issue here. The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent. The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself.

Enforcement of Guideline C-6 is thus a permissible exercise of the power of the Credentials Committee. Since the action of the District Court was properly based on its

conclusion that no constitutional violation existed in the application of Guideline C-6 to the 59 Illinois delegates. Judges Bazelon and Fahy do not find it necessary to the disposition of this appeal to reach the issues the District Court decided in the other parts of its order, and they express no opinion on the validity of the reasoning or conclusions of the District Court.[6]

Judge MacKinnon would additionally reach, and affirm, that portion of Judge Hart's order finding that Guidelines A-1 and A-2 are unconstitutional insofar as they might be interpreted to require imposition of quotas on the composition of any delegation. The Illinois challengers have sought to justify these two Guidelines by arguing that they do not impose rigid quotas based on race, sex, age or national origin, but rather that they constitute an exhortation to the State Parties to take strong affirmative action to ensure that these segments of the population are represented in the Presidential nominating process in roughly the same proportions as they exist in the general population. Judge MacKinnon believes this

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[6]Although Judges Bazelon and Fahy do not reach the question of the constitutionality of the action of the Credentials Committee based on rules A-1 and A-2, they find nothing in the order of the District Court which declares those rules unconstitutional. Paragraph 3 of the District Court's order of June 19, reissued on July 3, declares unconstitutional the use of any *quota* requirement to exclude a group of delegates. By their own terms, guidelines A-1 and A-2 do *not* require a quota. All that they require is that in order to remedy past discrimination, State Democratic Parties take affirmative action to increase the participation of certain groups in Party affairs. Paragraph 4 of the District Court's order expressly approved such a requirement, and the use of an exclusion sanction to enforce it. Judges Bazelon and Fahy read Judge Hart's order to say only that guidelines A-1 and A-2 could be unconstitutional as *applied*, if they were used to justify the imposition of a quota.

argument somewhat disingenuous, and would conclude that to the extent that the guidelines obviously do create some required preferences for such groups they do represent the imposition of quotas which are a denial of equal protection of the laws to those groups that are fenced out. Believing that quotas are thus to some extent being imposed by the Credentials Committee pursuant to guidelines A-1 and A-2, Judge MacKinnon would distinguish the judicial precedents upholding such affirmative action programs in the area of employment. *See, e.g., Carter* v. *Gallager,* 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied,* 40 U.S.L.W. 3557 (U.S. May 22, 1972); *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.) *cert. denied,* 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *Contractors Ass'n* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971). The Democratic National Party relies heavily on *Carter,* in which Judge Gibson, writing for the Eighth Circuit sitting en banc, states:

> The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another.

452 F.2d at 330. Yet this acknowledged violation of the Equal Protection Clause was justified on the basis that it was necessary to provide a remedy for practices which operated to deny the constitutional right to be free from racial discrimination in employment. Judge MacKinnon considers that the Illinois election laws do not operate in a manner which deprives any individual of any race, sex, age, etc. from the right to participate in any Illinois elec-

tion as a candidate or elector for any office. Absent any violation of constitutional rights in the conduct of elections in Illinois, he would find no justification for an affirmative action program here and would accordingly conclude that Guidelines A-1 and A-2 unconstitutionally deny equal protection without the necessity for doing so to protect other constitutional rights.

The Illinois Counter-Claim

The National Democratic Party appeals from the denial of their counterclaim against the Illinois plaintiffs seeking declaratory and injunctive relief barring further prosecution of an Illinois state court action previously brought by the plaintiffs against the Illinois challengers. In that state proceeding the plaintiffs sought a declaration that they were the duly elected delegates to the 1972 National Convention, and an injunction against the challengers from taking any action that would interfere with the plaintiffs' functioning as delegates to the Convention. Judge Hart based his denial of the counterclaim on the grounds that the question of the legality of the slate certified by the Credentials Committee in lieu of the plaintiffs was not before him, and that there was no justiciable issue presented in this action concerning the eligibility of the members of that slate to represent the Illinois districts in question.

In so ruling Judge Hart seems to have focused solely on the state law claims which apparently are the basis of the state proceeding, and which were not before the District Court here. However, in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law.

Proper resolution of the ultimate issues raised in the state proceeding would thus require consideration of both sets of requirements, and the interests of judicial efficiency, coupled with the rapidly expiring time remaining before the start of the Convention, call for resolution of those issues in one forum. At present the Illinois plaintiffs and the challengers are both parties to the state litigation and to these proceedings; thus their respective interests could be resolved in either forum and the ordinary principles of federalism and comity might be thought to require us to deny an injunction against the state proceeding. *Younger* v. *Harris,* 401 U.S. 37 (1971), and companion cases. But this counterclaim is brought by the National Party, whose interest in the ultimate resolution of the questioned qualifications of the Illinois delegation is clear, yet who is not a party in the state litigation. Their presence in this forum, brought here as defendants in a suit initiated by the same class of plaintiffs who are the plaintiffs in the state proceeding provides us with justification for enjoining further prosecution of that state court proceeding.

In taking this step, we must first be careful to ensure that the requirements for such an injunction are fully met. Two types of requirements must be met; the express language of 28 U.S.C. §2283, and the doctrines of equity, comity and federalism as recently articulated in *Younger, supra,* and its companion cases. Section 2283 provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

We find that either the first or third exception to §2283 authorizes us to enjoin further prosecution by the plaintiffs of their Illinois state suit.

The National Party alleges in its Counterclaim that its First Amendment right of association would be infringed by a state court declaration contradictory to the decision of the Credentials Committee to seat a delegation consisting of delegates other than plaintiffs. The Party thus grounds the jurisdiction of its Counterclaim on 42 U.S.C. §1983, which authorizes a "suit in equity" to redress the deprivation "of any rights, privileges and immunities secured by the Constitution." In *Mitchum* v. *Foster,* 40 U.S. L.W. 4737 (U.S. June 19, 1972), the Supreme Court expressly held that an action brought under §1983 is one "expressly authorized by Act of Congress" and is thus within the first exception to §2283's prohibition against enjoining state proceedings.

We also consider that an injunction is necessary to protect and effectuate our judgment upholding the action of the Credentials Committee here. The Resolution of the Committee which we have here approved provides that the 59 plaintiffs in this suit are not to be seated as the delegates to the Convention from their districts in Illinois. It also provides that 59 other persons shall be seated as the delegates from those districts. In order to protect our judgment approving this Resolution, it is necessary to enjoin plaintiffs from taking any action in any other court that would impair the effectiveness and the integrity of the judgments of this Court.

Finally, we must consider whether the fundamental policy against federal interference in state litigation so strongly reaffirmed in *Younger,* with respect to criminal prosecutions, 401 U.S. at 46, bars our taking this action in the civil suit presently before us. We conclude that it

does not. In *Mitchum, supra,* the Court described its holding in *Younger* as follows:

> [t]he Court clearly left room for federal injunctive intervention in a pending state court prosecution *in certain exceptional circumstances*—where irreparable injury is "both great and immediate," 401 U.S., at 46, . . . or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." 401 U.S., at 54. In the companion case of *Perez* v. *Ledesma,* 401 U.S., 82, the Court said that ". . . perhaps *in other extraordinary circumstances* where irreparable injury can be shown . . . federal injunctive relief against pending state prosecutions [is] appropriate." 401 U.S., at 85. 40 U.S.L.W. at 4738. (emphasis added).

Irreparable injury, "both great and immediate," are clearly shown here. If plaintiffs were successful in their state proceedings one likely result would be that no delegates from the challenged Illinois districts could be seated at the Convention. Such a result would not just deprive the National Party of the participation of those persons whom it has selected to fill those delegate seats, more fundamentally it would deprive all Democrats residing in those districts of any voice or representation in the process by which their party's candidate for the Presidency is selected. The immediacy of this injury is clear—the Convention begins in five days—and after that the injury is wholly irreparable.

We also consider that the unique situation presented by these two cases, all interested parties represented in the federal forum and a critical party missing from the state forum; this court's familiarity with the complex of issues involved—bred and nurtured in the consideration of both the California and Illinois challenges; both actions commenced in the separate forums by the same class of

plaintiffs; and the rapidly expiring time within which any judicial action is possible—amply provide the extraordinary and unusual circumstances that call for equitable relief. For the foregoing reasons we reverse the District Court's denial of the National Party's Counterclaim, and we accordingly enjoin the Illinois plaintiffs from taking action in any other Court that would impair the effectiveness and the integrity of the judgments of this Court.

IV.

Accordingly, the motion for summary reversal in No. 72-1629 is denied; the motions for summary reversal in Nos. 72-1630, 72-1631 and 72-1628 are granted and the cases are remanded to the district court for the entry of orders consistent with this opinion.

So ordered.

Fahy, *Senior Circuit Judge,* concurring in Nos. 72-1629, 72-1630, and 72-1631, the Illinois cases, dissenting in No. 72-1628, the California case.

The decision of the Credentials Committee in the California case I think was within the competence of the Committee to make, subject to the will of the Convention. The contention to the contrary is that the action of the Committee deprived the plaintiffs-appellants of "life, liberty or property, without due process of law." The Committee action, however, would require the California delegation to the Convention to reflect the apparent choice in the primary of the several candidates for whom the people voted, in proportion to the votes the respective candidates received. Such a decision cannot in and of itself be described as a denial of due process of law. Moreover, it is quite consistent with the ongoing reform movement within the Party. It is said, however, that this otherwise quite acceptable result was a deprivation of due process

of law, not because the California plan of "winner-take-all" must be accepted because the statute so provides,[1] but principally because (1) there was no objection made to the statute by any candidate prior to the primary, (2) there was also evidence of its acceptance by Party officials, (3) the California legislature had recently reaffirmed the plan.[2] When the matter came before the Credentials Committee, however, that agency of the Party interpreted the reform resolution of the 1968 Convention, together with the guide-lines thereafter adopted by the National Committee, to furnish a basis for the decision it rendered apportioning the delegates. Whether or not one agrees with this interpretation, I find in it and in its result no violation of the particular provision of the Constitution upon which appellants rely, or of any other of the provisions of the Constitution. Whatever the political motivations of members of the Committee the action taken is not thereby rendered unconstitutional. I add that in my opinion the action of the Committee should not be overturned merely because it operated retroactively, as any decision of a court or agency usually does. *Cf. Chenery* v. *S.E.C.*, 332 U.S. 194 (1947). I accordingly would leave the matter for resolution by the Party, soon to meet in Convention, without the court intervening by decree to set aside the action of the Committee.

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[1] Our decision in No. 72-1629 supports the action of the Credentials Committee though the Committee did not feel bound by the Illinois statute.

[2] The extent of any detrimental reliance by the affected candidates upon the California plan seems to me wholly speculative. Moreover, no one acting in a non-partisan capacity on behalf of the voters in the California primary has sought participation in this litigation to contest the action of the Credentials Committee.

It does not appear to me that the fairness of the process of electing the President of the United States is endangered either by the action of the Credentials Committee in apportioning the delegation according to the votes for each candidate in the primary, or by the Committee's interpretation of its authority, stemming primarily from the 1968 Convention, considered with the guide-lines subsequently promulgated by the McGovern-Fraser Commission, and approved by the National Committee. These guide-lines, largely relied upon by the court, provide as follows with respect to their own status:

> "Because the Commission was created by virtue of actions taken at the 1968 Convention, we believe our legal responsibility extends to that body and that body alone. We view ourselves as the agent of that Convention on all matters related to delegate selection. Unless the 1972 Convention chooses to review any steps the Commission has taken, we regard our Guidelines for delegate selection as binding on the states."

Thus, as it seems to me, the guide-lines, in their reference to the 1972 Convention, afford greater latitude to the Credentials Committee in making its recommendation to the Convention than the court permits.

[*Exhibit to Report of Proceedings in Circuit Court of Cook County, July 8, 1972*]

IN THE
SUPREME COURT OF THE UNITED STATES

Lawrence O'BRIEN et al., Petitioners,
v.
Willie BROWN et al.
Thomas E. KEANE et al., Petitioners,
v.
NATIONAL DEMOCRATIC PARTY et al.

Application Nos. A-23 and A-24
(In re Case Nos. 72-34 and 72-35)
[At July 7 Special Term, 1972].
Decided July 7, 1972.

PER CURIAM.

Yesterday, July 6, 1972, the petitioners filed petitions for writs of certiorari to review judgments of the United States Court of Appeals for the District of Columbia Circuit in actions challenging the recommendations of the Credentials Committee of the 1972 Democratic National Convention regarding the seating of certain delegates to the convention that will meet three days hence.

In No. 72-35, the Credentials Committee recommended unseating 59 uncommitted delegates from Illinois on the ground, among others, that they had been elected in violation of the "slatemaking" guideline adopted by the Democratic party in 1971. A complaint challenging the Credentials Committee action was dismissed by the District Court. The Court of Appeals on review rejected the contentions of the unseated delegates that the action of the Committee

violated their rights under the Constitution of the United States.

In No. 72-34, the Credentials Committee recommended unseating 151 of 271 delegates from California committed by California law to Senator George McGovern under that State's "winner-take-all" primary system. The Committee concluded that the winner-take-all system violated the mandate of the 1968 Democratic National Convention calling for reform in the party delegate selection process, even though such primaries had not been explicitly prohibited by the rules adopted by the party in 1971 to implement that mandate. A complaint challenging the Credentials Committee action was dismissed by the District Court. On review the Court of Appeals concluded that the action of the Credentials Committee in this case violated the Constitution of the United States.

Accompanying the petitions for certiorari were applications to stay the judgments of the Court of Appeals pending disposition of the petitions.

The petitions for certiorari present novel questions of importance to the immediate litigants and to the political system under which national political parties nominate candidates for office and vote on their policies and programs. The particular actions of the Credentials Committee on which the Court of Appeals has ruled are recommendations that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee.

This Court is now asked to review these novel and important questions and to resolve them within the remaining days prior to the opening sessions of the convention now scheduled to be convened Monday, July 10, 1972.

The Court concludes it cannot in this limited time give to these issues the consideration warranted for final decision on the merits; we therefore take no action on the petitions for certiorari at this time.

The applications to stay the judgments of the Court of Appeals call for a weighing of three basic factors: (a) whether irreparable injury may occur absent a stay; (b) the probability that the Court of Appeals was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the judgments of the Court of Appeals.

Absent a stay, the mandate of the Court of Appeals denies to the Democratic National Convention its traditional power to pass on the credentials of the California delegates in question. The grant of a stay, on the other hand, will not foreclose the Convention's giving the respective litigants in both cases the relief they sought in federal courts.

We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates.[1] No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy and essentially political

[1] This is not a case in which claims are made that injury arises from invidious discrimination based on a race in a primary contest within a single State. Cf. Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

in nature. Cf. Luther v. Borden, 7 How. 1, 12 L.Ed. 581 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (CA8 1968), affirming, 287 F.Supp. 794 (D.C. Minn. 1968), and cases cited; Lynch v. Torquato, 343 F.2d 370 (CA3 1965); Smith v. State Exec. Comm. of Dem. Party of Ga., 288 F.Supp. 371 (N.D.Ga. 1968). Cf. Ray v. Blair, 343 U.S. 214, 72 S.Ct. 654, 96 L.Ed. 894 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed.

We recognize that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions. If this system is to be altered by federal courts in the exercise of their extraordinary equity powers, it should not be done under the circumstances and time pressures surrounding the actions brought in the District Court, and the expedited review in the Court of Appeals and in this Court.[2]

The applications for stays of the judgments of the Court of Appeals are granted.

Applications Granted.

Mr. Justice BRENNAN is of the view that in the limited time available the Court cannot give these difficult and important questions consideration adequate to their proper resolution. He therefore concurs in the grant of the stays pending action by the Court on the petitions for certiorari.

Mr. Justice WHITE would deny the applications for stays.

Mr. Justice DOUGLAS, dissenting.

I would deny the stays and deny the petitions for certiorari. The grant of the stays is, in all respects, an abuse of the power to grant one. A stay presupposes an ultimate decision on the merits. But the petitions for certiorari will not be voted on until October, at which time everyone knows the cases will be moot. So the action granting the stays is an oblique and covert way of deciding the merits.

[2]Argument was had and the case decided in the District Court on July 3; the Court of Appeals entered its judgment July 5. Papers were filed here July 6.

If the merits are to be decided, the cases should be put down for argument. As Mr. Justice MARSHALL has shown, the questions are by no means frivolous. The lateness of the hour before the Convention and the apparently appropriate action by the Court of Appeals on the issues combine to make a denial of the stay and a denial of the petitions the only responsible action we should take without oral argument.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS joins, dissenting.

These two separate actions challenge the exclusion from the Democratic national convention by the party's credentials committee of 151 delegates from the State of California and 59 delegates from the State of Illinois, all of whom were selected as delegates as a result of primary elections in their respective States. The excluded delegates allege, in essence, that the refusal of the party to accept them as delegates denies them due process, and denies the voters who elected them their right to full participation in the electoral process as guaranteed by the United States Constitution.[1]

Two assertions are central to the challenge made by the delegates from California. First, they contend that under California's winner-take-all primary election law, which the Democratic party explicitly approved prior to the 1972 primary election,[2] and which the California voters relied on in casting their ballots, they are validly elected dele-

[1] While the delegates couch their arguments in various ways, all of the arguments boil down to these two: *i.e.*, they have been denied due process and the voters who elected them have been denied an opportunity to vote for the candidate or delegate of their choice.

[2] This approval was given in the form of a written communication from the Commission on Party Structure and Delegate Selection to the Democratic National Committeeman from California.

gates committed to the presidential candidacy of Senator George McGovern. Second, they claim that after all of the presidential candidates who were on the ballot in California had planned and carried out their campaigns relying on the validity of the State's election laws, and after all votes had been cast in the expectation that the winner of the primary would command the entire California delegation, the credentials committee changed the party's rules and reneged on the party's earlier approval of the California electoral system. The delegates contend that, in so doing, the committee and the party impaired the rights of both voters and duly elected delegates in violation of the Fourteenth Amendment.[3]

The Illinois delegates contend that they were excluded on the ground that they were "selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago and specifically and clearly identifiable as the party apparatus in [certain districts], to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate."[4] They argue that the restrictions placed by the rules on party officials violate their rights under the First and Fourteenth Amendments. It is also suggested that another reason why the delegates were excluded was that their delegation had an insufficient number of Negroes, women, and representatives of certain other identifiable classes of persons. This is alleged to be establishment of a "quota" system in violation of the Fourteenth Amendment.[5]

[3] A hearing officer found merit in the delegates' claims, but he was reversed by the credentials committee.

[4] Report of Hearing Officer, at 2, adopted by Credentials Committee, June 30, 1972.

The United States District Court for the District of Columbia denied both sets of plaintiffs relief on the ground that there was no justiciable question before it.[6] The United States Court of Appeals reversed the District Court and held that the questions presented in both suits were justiciable. It unanimously rejected the challenge made by the Illinois delegates, and by a 2-1 vote upheld the claim of the delegates from California that the belated change in the rules constituted a denial of due process of law.

The losing parties in the Court of Appeals seek review, and today, this Court grants partial relief in the form of a stay of the judgment of the Court of Appeals. The Court holds, in effect, that even if the District Court was incorrect in ruling that the issues before it were "political questions" not properly justiciable in a court of law, the posture and timing of these cases require that federal courts defer to the Democratic national convention for resolution of the underlying disputes. I cannot agree.

In each of these cases, the claim is made that the Credentials Committee has impaired the right of Democratic voters to have their votes counted in a Presidential pri-

[5] Report of Hearing Officer, at 3-4.

[6] The District Court Judge indicated that, in his view, a quota system would raise serious constitutional questions. Two judges of the Court of Appeals found that the rules did not require any quotas. Judge MacKinnon disagreed, believed that the rules did establish a quota, and that they were, therefore, unconstitutional.

mary election. The related claim is also made that the Committee has deprived the delegates themselves of their right to participate in the convention, by methods which deny them due process of law. Both these claims are entitled to judicial resolution, and now is the most appropriate time for them to be heard.

If these cases present justiciable controversies, then we are faced with a decision as to the most appropriate time to resolve them. There would appear to be three available choices: now; after the credentials committee's report is either accepted or rejected by the national convention; or after the convention is over.

There can be no doubt, in my view, that there is, at the present time, a live controversy between the excluded delegates and the Democratic National Committee. Nevertheless, because this controversy may vanish at the national convention, it is suggested that judicial interventon is premature at this point. This may be correct with respect to a decision on whether to grant injunctive relief, but not with respect to the appropriateness of a declaratory judgment.

Should this Court, or a lower federal court, be compelled to wait until the national convention makes a final decision on whether it will seat the delegates excluded by the credentials committee, it may never again be practicable to consider the important constitutional issues presented. Once the convention rules, we will be faced with the Hobson's choice between refusing to hear the federal questions at all, or hearing them and possibly stopping the Democratic convention in midstream. This would be a far more serious intrusion into the democratic process than any we are asked to make at this time.

If we wait even longer—until the national convention is over—and ultimately sustain the delegates' claims on the merits, we would have no choice but to declare the convention null and void and to require that it be repeated. The dispute in these cases concerns the right *to participate* in the machinery to elect the President of the United States. If participation is denied, there is no possible way for the underlying disputes to become moot. The drastic remedy that delay might require should be avoided at all costs.

It is, therefore, obvious to me that now is the time for us to act. It is significant in this regard that the delegates request declaratory, as well as injunctive, relief. A declaratory judgment is a milder remedy than an injunction, cf. Perez v. Ledesma, 401 U.S. 82, 111, 91 S.Ct. 674, 690, 27 L.Ed.2d 701 (Brennan, J., concurring in part and dissenting in part). It is a particularly appropriate remedy under these circumstances, because it can protect any constitutional rights that may be threatened at the same time that the premature issuance of an injunction is avoided. Hence, I believe that we should consider the prayer for declaratory relief and that we should do so now.

In granting the stay, then, the Court seems to rely at least in part on the view that the claims are not yet ripe for decision, a view which I cannot accept for the reasons stated above. In addition, the Court suggests that judicial relief will be inappropriate even after the full Convention has ruled on these claims. The point appears to be that, quite apart from the mere matter of timing, the case presents a "political question," or is otherwise nonjusticiable, because it concerns the internal decision-making of a political party. That argument misconceives the nature and the purpose of the doctrine. Half a century ago, Justice Holmes, writing for a unanimous Court, made

it clear that a question is not "political" in the jurisdictional sense, merely because it involves the operations of a political party:

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since Ashby v. White, 2 Ld.Raym. 938, 3 Ld.Raym. 320, and has been recognized by this Court. Wiley v. Sinkler, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 45 L.Ed. 84; Giles v. Harris, 189 U.S. 475, 485, 23 S.Ct. 639, 47 L.Ed. 909. See also Judicial Code, § 24(11), (12), (14); Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092 (Comp.St. § 991). If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result." Nixon v. Herndon, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927).

The doctrine of "political questions" was fashioned to deal with a very different problem, which has nothing to do with this case. As the Court said in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961), the basic characteristic of a political question is that its resolution would lead a court into conflict with one or more of the coordinate branches of government; courts do decline to decide political questions out of deference to the separation of powers. 369 U.S., at 217, 82 S.Ct., at 710; see Powell v. McCormack, 395 U.S. 486, 518-549, 89 S.Ct. 1944, 1962, 1979, 23 L.Ed.2d 491 (1969). Neither the executive nor the legislative branch of government purports to have jurisdiction over the claims asserted in these cases. Apart from the judicial forum, only one other forum has been suggested—the full convention of the National Democratic

Party—and that is most assuredly not a coordinate branch of government to which the federal courts owe deference within the meaning of the separation of powers or the political question doctrine.

Moreover, it cannot be said that "judicially manageable standards" are lacking for the determinations required by these cases, 369 U.S., at 217, 82 S.Ct., at 710. The Illinois challenge requires the court to determine whether certain rules adopted by the National Party for the selection of delegates violate the First and Fourteenth Amendment rights of Illinois voters and, if the rules are valid, whether they were correctly applied to the facts of the case. The California challenge requires the court to determine whether the votes of party members were counted in accordance with the rules announced prior to the election and, if not, whether a change in the rules after the election violates the constitutional rights of the voters or the candidates. Both these determinations are well within the range of questions regularly presented to courts for decision, and capable of judicial resolution.

A second threshold objection, however, has been raised as an obstacle to judicial determination of these claims. Even if the actions of a political party are not inherently nonjusticiable, it is suggested that the Constitution places few, if any, restrictions on the actions of a political party, and none of those restrictions are even arguably implicated by any of the allegations here. On this view, then, the plaintiffs below failed to state a claim on which relief can be granted. I disagree.

1. First, I agree with the Court of Appeals that the action of the Party in these cases was governmental action, and therefore subject to the requirements of due process. The primary election was, by state law, the first step in a process designed to select a Democratic candi-

date for President; the State will include electors pledged to that candidate on the ballots in the general election. The State is intertwined in the process at every step, not only authorizing the primary but conducting it, and adopting its result for use in the general election. In those circumstances, the primary must be regarded as an integral part of the general election, see United States v. Classic, 313 U.S. 299, 61 S.Ct., 1031, 85 L.Ed. 1368 (1941), quoted at p. 2726, *infra*, and the rules that regulate the primary must be held to the standards of elementary due process.

It is suggested that California, at least, cannot be charged with responsibility for the rules that are challenged here, because California by law sought (albeit unsuccessfully) to prohibit the party from adopting those rules. That argument is somewhat disingenuous, however, unless it can seriously be contended that California will decline to recognize on its ballot in the general election the nominee of the Democratic convention. For so long as the State recognizes and adopts the fruits of the primary as it was actually conducted, then the State has made that primary an integral part of the election process, and infused the primary with state action, no matter how vociferously it may protest. A State cannot render the action of officials "private" and strip it of its character as state action, merely by disapproving that action. Monroe v. Pape, 365 U.S. 167, 172-187, 81 S.Ct., 473, 476-484, 5 L.Ed. 2d 492 (1961).

Thus, when the Party deprived the candidates of their status as delegates, it was obliged to do so in a manner consistent with the demands of due process. Because the Court does not reach the question, I likewise refrain from expressing my views on the merits of the due process challenge in either case. It is sufficient to say that beyond all doubt, these claimants are entitled to a judicial resolution of their claim.

2. Even if the action of the credentials committee did not deny the delegates due process, plaintiffs in these cases claim that it impaired the federally protected right of voters to vote, and to have their votes counted, in the presidential primary election.[7]

It is of course well established that the Constitution protects the right to vote in federal or state elections without impairment on the basis of race or color, Const. Amend. XV, or on the basis of any other invidious classification, e. g., Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961); Dunn v. Blumstein, 404 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). With respect to federal elections, however, the right to vote enjoys a broader constitutional protection. In Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1971), Mr. Justice Black cited a long line of precedent for the proposition that Congress has ultimate supervisory power over all congressional elections, based on Art. I, § 4 of the Constitution. E. g., Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717

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[7] The alleged impairment of that right may be regarded as state action, as above, and hence subject to challenge under 42 U.S.C. § 1983. Alternatively, it may be regarded as the action of the Federal Government, on the theory that Congress has the ultimate authority over presidential elections, and has acquiesced in the administration of the primary election process by the national political parties; in that case it may be subject to challenge on the theory of an implied remedy for a federal deprivation of constitutional rights, see Bivens v. Six Unknown Named Agents etc., 403 U.S. 388, 91 S.Ct. 1999. 29 L.Ed.2d 619 (1971). Finally, it may be regarded as private action which interferes with a federally protected right; in that case the existence of a right of action may depend on the question whether the claims can be brought within the terms of 42 U.S.C. § 1985(3), which protects certain federal rights against certain kinds of private interference, see Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

(1880); Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). On the basis of these precedents, it is beyond dispute that the right to vote in congressional election is a federally secured right.

Mr. Justice Black went on to argue that presidential elections have the same constitutional status: "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." 400 U.S., at 124, 91 S.Ct., at 264. To support this conclusion, he relied on Art. II, § 1, and its judicial interpretation in Burrough v. United States, 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484 (1933), and also on "the very concept of a supreme national government with national officers." 400 U.S., at 124 n. 7, 91 S.Ct., at 264. On the basis of Oregon v. Mitchell, then, in which Mr. Justice Black's analysis was decisive, the right to vote in national elections, both congressional and presidential, is secured by the Federal Constitution.

Moreover, federal protection of the right to vote in federal elections extends not only to the general election, but to the primary election as well. In United States v. Classic, 313 U.S. 299, 308, 61 S.Ct. 1031, 1034, 85 L.Ed. 1368 (1940), this Court sustained an indictment charging a conspiracy "to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as

cast." 313 U.S., at 308, 61 S.Ct., at 1034. It was critical to the decision to hold first that the Constitution protects the right to vote in federal congressional elections, and second that the right to vote in the general election includes the right to vote in the primary.

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right, protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." 313 U.S., at 318, 61 S.Ct., at 1039.

That reasoning has equal force in the case of a presidential election. Where the primary is by law made an integral part of the election machinery, then the right to vote at that primary is protected just as is the right to vote at the election. In the cases before this Court, it is claimed that the presidential primary is an integral part of the election machinery, and that the right to vote in the presidential primary has been impaired. That claim should be heard and decided on its merits, certainly not by the use of the stay mechanism in lieu of granting certiorari and plenary consideration.

It is unfortunate that cases like these must be decided quickly or not at all, but sometimes that cannot be avoided. Where there are no substantial facts in dispute, and where the allegation is made that a right as fundamental as the right to participate in the process leading to the election of the President of the United States is threatened, I believe that our duty lies in making decisions, not avoiding them.

I would therefore deny the Stay.

[*Exhibit to Report of Proceedings in Circuit Court of Cook County, July 8, 1972*]

CHICAGO CREDENTIALS CHALLENGERS' RULES OF PROCEDURE FOR EIGHT CONGRESSIONAL DISTRICT CAUCUSES TO CHOOSE A CHICAGO CHALLENGE DELEGATION TO BE HELD JUNE 22, 1972

1. *Call.* Caucuses shall be held in the 1st, 2nd, 3rd, 5th, 7th, 8th 9th and 11th Congressional Districts. The eight caucuses shall be held pursuant to the Statement of Challenge filed with the Democratic National Committee, and pursuant to the Rules of the National Democratic Party.

2. *Rules.* The rules stated herein shall be the rules for the eight district caucuses and shall not be altered or modified at any caucus.

3. *Coordinator.* The Chicago Credentials Challengers have appointed a coordinator for each district caucus. Each coordinator shall chair the district meetings and is empowered, pursuant to the letter of appointment, to make all determinations consistent with the rules herein.

4. *Eligibility.* Except as otherwise provided in this paragraph, all persons whose names appeared on the March 21st, 1972 ballot as candidates for delegate to the Democratic National Convention in the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts shall be eligible to vote in the manner described below in their respective district caucuses. Any person whose name appeared on said ballot, in the aforementioned Congressional Districts, and whose credentials have been challenged before the Credentials Committee of the Democratic National Committee shall not be eligible to vote in said caucuses. In the 9th Congressional District caucus, in addition to those persons who have been challenged, Judah L. Graubart, Natalie Forman, James H. Schwartz,

Marilou Hedlund, Scott Hodes and Martin Tuchow also are ineligible to vote.

5. *Purpose.* The caucuses shall elect in the manner prescribed below delegates and alternates to the Democratic National Convention in each district caucus as follows:

District	Delegates	Alternates
1st	7	3
2nd	7	3
3rd	5	2
5th	7	3
7th	7	3
8th	7	3
9th	4	3
11th	7	3
	Total.....51	Total.....23

Each district caucus shall take affirmative steps to assure that the delegation selected pursuant to these rules is representative of the population of that district.

6. *Open Meetings.* All meetings held herein shall be open to all persons.

7. *Order of Business.*

A. *Reading of Rules.* The coordinator shall distribute copies of the rules and shall read the rules to the caucus.

B. *Distribution of Materials on Voting.* The coordinator shall distribute a statement which shall include the percentage of the population in each district of Blacks, Latins, women and young persons and shall also include a statement of the total vote cast for each person eligible to vote herein and the percentage of that vote received by each person eligible to vote herein. The coordinator shall also distribute, at the appropriate times, official nominating forms and official ballots.

C. *Selection of Tellers.* Two tellers shall be selected by the coordinators.

D. *Composition of Delegation.* Persons eligible to vote shall first reach a determination on the proportionate representation for the district's challenge (i) delegates and (ii) alternates (e.g. four women, three youths, three Blacks, one Latin).

E. *Nominations.* Any registered voter who did not take a Republican ballot in the March 21st Primary may be nominated for the position of challenge delegate at the district caucus in which said person is registered to vote. Any person present who is a registered voter in the district may place a name in nomination. All nominations shall be submitted in writing to the caucus coordinator. Persons may nominate themselves or other persons eligible pursuant to these rules. Persons nominated shall be nominated as committed to a particular presidential candidate or as uncommitted nominees. Nominations may be made or withdrawn prior to any ballot taken pursuant to these rules. Subject to reasonable time limitations determined by the coordinator statements may be made regarding any nomination by any person present.

F. *Voting.*

(1) Persons eligible to vote shall cast a vote which is equal to the percent of the vote that person received of the total vote cast in the March 21st Primary for those candidates for delegate to the Democratic National Convention who are eligible to vote pursuant to these rules. Each person's vote shall be called that person's "weighted vote" and that vote shall be cast uniformly.

(2) Votes may be cast only by persons eligible to vote who are present at the time the vote is taken.

(3) There shall not be cumulative voting.

(4) Persons eligible to vote may cast their "weighted vote" for up to the number of persons to be elected in each district. Ballots marked for more than the number of persons to be elected shall be declared invalid.

(5) A ballot will be taken. The tellers will tally the "weighed votes" and those candidates, equal to the number to be chosen in that district, receiving the highest vote totals will then be checked to determine whether or not they conform to the proportionate representation determined under Paragraph 7-D herein. If they do not conform, a second ballot shall be taken. Delegates shall not be elected on partial ballots; the entire delegation from each district shall be elected on one ballot. Ballots shall be taken until a delegation has been chosen.

(6) When the delegates have been elected, those eligible to vote shall then elect alternates pursuant to the procedures established herein for the election of delegates.

8. *Chicago Challengers Convention.* Persons elected in each of the district caucuses as challenge delegates and alternates shall be eligible to participate in a Chicago Challengers Convention to be held on Saturday, June 24, 1972 at 2:00 p.m. at which time eight at-large-delegates and eight at-large-alternates will be chosen. The convention will be held at the Sheraton-Chicago Hotel in the San Juan Room.

CHICAGO CREDENTIALS CHALLENGERS
BY: John R. Schmidt
Steven Franklin Schwab
Wayne W. Whalen
Attorneys

[*Entered July 8, 1972*]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT — CHANCERY DIVISION

PAUL T. WIGODA, etc.,

Plaintiff,

v.

WILLIAM COUSINS, et al.,

Defendants.

No. 72 CH 2288

ORDER

This cause coming on to be heard on the motion of plaintiff, Paul T. Wigoda, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts similarly situated, for preliminary injunction, due and proper notice being given, counsel for plaintiff and defendants being present and the Court being fully advised in the premises, and

The Court having heard oral argument and having considered the pleading and other material filed with the Court and having heard and considered argument on the motion of defendants to dismiss the complaint without limitation to said argument, and said motion to dismiss having been denied and the defendants having rested thereon and having advised the Court that they would make no answer to the complaint but would stand on their motion, and plaintiffs having proceeded with the evidence,

and defendants' counsel having taken part in the examination and presentation of the evidence of plaintiff by objection and otherwise, and the defendants having entered into stipulation of fact on the record with plaintiff and further having offered evidence on behalf of defendants and the Court having considered the evidence of all of the parties hereto and the arguments of counsel;

The Court finds:

1. This action is brought by plaintiff pursuant to Ill. Rev. Stat. ch. 69 §§1 and 3 to enjoin defendants from interfering with the right of plaintiff and the class of challenged and uncommitted delegates and alternates to the 1972 Democratic Convention (hereinafter the "Convention") to participate in said Convention as duly elected delegates and alternates.

2. Plaintiff is a citizen and resident of the State of Illinois, is a registered voter of the 9th Congressional District in which he resides, is an attorney at law and an alderman of the City of Chicago, having been duly elected to that office by the residents of the 49th Ward in 1971. As described hereinafter, plaintiff was duly elected a delegate of the Convention in accordance with the provisions of the Illinois Election Code.

3. Plaintiff is the representative of the class of persons residing in the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois who were duly elected as "uncommitted" delegates and alternates to the Convention in accordance with the provisions of the Illinois Election Code and fairly and adequately represents said class. The issues of fact and law herein are common to plaintiff and all other members of the class. Plaintiff and the class thus described are hereinafter collectively referred to for convenience as "the delegates".

4. The delegates are persons of white, black and Latin American extraction and include males, females and per-

sons of all ages. The delegates are so numerous that joinder of all of them in litigation is impracticable.

5. Defendants are citizens of the State of Illinois and residents of Cook County.

6. The selection of delegates to national conventions of the political parties is duly provided for and controlled by the statutes of the State of Illinois, to-wit, §§7-14 and 14.1 of the Illinois Election Code (Ill.Rev.Stat. ch. 46, §§7-14 and 7-14.1) and other sections hereinafter cited. As stated in Section 7-1 of the Code, the election of delegates and alternates "to National nominating conventions . . . shall be made in the manner provided in this Article 7 and not otherwise."

7. On or before January 19, 1972, plaintiff and the delegates filed nominating petitions signed by at least one-half of one percent of the qualified primary electors of the Democratic Party residing in their respective Congressional districts. Said petitions were completed in accordance with the provisions of Section 7-10 of the Illinois Election Code (Ill.Rev.Stat. ch. 46, §§7-10) and filed in accordance with Section 7-12 of the Code. Defendants made no challenge to such petitions nor were such petitions nullified or stricken by the electoral boards of the City of Chicago or the County of Cook. Plaintiff and the delegates were thereafter certified by the State Electoral Board in accordance with Section 7-14 of the Code and their names properly placed on the ballots for the primary election of March 21, 1972.

8. Thereafter, on March 21, 1972, plaintiff and the delegates were duly elected by a majority of the qualified electors of the Democratic Party voting in their respective Congressional districts in accordance with Sections 7-46 through 7-51 of the Code. The results of such elections were canvassed, certified and reported as required by Section 7-53 through 7-58 of the Code.

9. Section 7-63 of the Code provides a procedure by which the results of a primary election of a political party may be contested. The objecting party must file with the Clerk of this Court a petition in writing setting forth the grounds of contest within ten days after the completion of the canvas of the returns in such election by the canvassing board. Defendants have at no time availed themselves of the foregoing procedure or any other lawful procedure for the challenging of elections.

10. On April 18, 1972, the Secretary of State of the State of Illinois, pursuant to Section 7-58 of the Code, issued his proclamation announcing the election of the delegates.

11. Thereafter, on June 22 and June 24, 1972, those defendants listed in Schedule A hereto were selected as "alternative" delegates and alternates to the Convention in caucuses governed by certain rules of procedure established by the defendants and adopted without regard to the applicable requirements of the Illinois Election Code.

12. In contrast, plaintiff and the class he represents were elected in a free, equal, open and non-discriminatory election in which, in accord with stipulations made by defendants herein, anyone could run for office and any qualified person could vote. In said election, there were 180 candidates for 62 delegate seats.

13. No other election for delegate was conducted under the Illinois Election Code other than that election at which plaintiff and the class he represents were elected to be delegates to the Democratic National Convention.

14. On June 30, 1972, the defendants listed in Schedule A were, by resolution of the Credentials Committee of the Democratic National Convention, certified as delegates and alternates to the Convention in place of plaintiff and the other members of the class who were duly and properly elected under the Illinois Election Code.

15. Defendants established themselves solely on the basis of their own authority to select delegates from the above-mentioned Illinois Congressional Districts and without any legal justification or authority from any other people or the laws of the State of Illinois.

16. By virtue of the findings herein, the Court finds irreparable injury as follows:

(a) Plaintiff and the class he represents have been deprived of a place of authority, prestige and position to which they were entitled by virtue of the votes of the persons participating in the aforementioned primary election held pursuant to and in accord with the Illinois Election Code;

(b) The duly qualified voters who caused plaintiff and the class of persons he represents to be elected have been deprived of their right to vote and to vote effectively;

(c) The electoral process in the State of Illinois has been subverted, thwarted and nullified by the actions of defendants and persons acting in conjection and association therewith;

(d) Plaintiff and the class of persons he represents have been deprived of their rights, obtained pursuant to a lawful election, of participating with other party functionaries in the conduct of the Democratic National Convention and from taking part in decisions to be made therein, all of which will be vital to the electorate in the State of Illinois who participated in the duly authorized election.

17. The fact that the Democratic National Convention is scheduled to convene on Monday, July 10, 1972 renders the aforesaid harm immediate and, unless defendants are herein enjoined, inevitably irreparable.

18. Each of the defendants listed in Schedule A have formally appeared before this Court and have submitted themselves to its jurisdiction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from acting or purporting to act as a delegate to the Democratic National Convention to be held commencing on July 10, 1972 from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th or 11th Congressional districts of the State of Illinois or from performing the functions of delegates from the aforesaid districts including but not limited to voting in the aforesaid Convention or in official or duly designated committees thereof.

2. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from receiving or accepting any credentials, badges or other indicia of delegate status from the officials of the aforesaid Democratic National Convention or its official or duly designated committees.

[3. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from holding themselves out to be or representing themselves to be delegates lawfully representing the aforementioned Illinois Congressional districts.] [deleted]

Notice of entry of this Order to counsel for the defendants shall be deemed to be notice to each of the persons on whose behalf counsel has appeared;

IT IS FURTHER ORDERED, that notice of this injunction may be served by any person designated by plaintiff or his counsel.

Dated: July 8, 1972 ENTER:

/s/ Daniel A. Covelli Judge

[*Exhibit to Report of Proceedings in Circuit Court of Cook County, August 1, 1972*]

CAUCUS
11th CONGRESSIONAL DISTRICT

June 22, 1972
7301 North Osceola
Chicago, Illinois

PROCEEDINGS

MR. VIRGILIO, John V.: We're here pursuant to the notice of the meeting that you're having for the delegates.

MISS FITZGERALD, Cathy: Who are you with? Are you some of the delegates?

MR. VIRGILIO: No. We're members of the Democratic Party.

MISS FITZGERALD: Come in.

MR. VIRGILIO: Thank you.

(Proceeded inside. Introductions)

MR. SCHMIDT: We're going to try to set it up so that . . .

MR. CLEWIS: Are you the Coordinator?

MR. SCHMIDT: Yes, I am. We have quite a few more people than we thought would attend. Our room doesn't have quite enough space. We have more people than we were expecting.

MR. CLEWIS. You are Mr. Schmidt?

MR. SCHMIDT: That's correct.

MR. CLEWIS: And, you are the Coordinator?

MR. SCHMIDT: Yes, I am.

MR. VIRGILIO: I am John Virgilio.

MR. CLEWIS: I am Richard Clewis.

Caucus

MR. SCHMIDT: I understand all of you understand the basic rules which are that the people who are entitled to vote are the people who ran on March 21st and were defeated by the Daley organization. These are people of the Democratic Party. These are people who ran on the Democratic ballot and were defeated.

Everyone else is invited to attend as spectators and contribute as you like. We weren't expecting this number of people. Frankly, we didn't expect a delegation of this number interested in being spectators at the meeting, but there is no objection.

MR. VIRGILIO: In other words, we are precluded from being participants?

MR. SCHMIDT: You are precluded from voting for the new national convention delegates. You are not precluded from speaking if you choose to do so.

MR. WRONSKI: In other words, it's a get-together between the delegates to express their feelings.

MR. SCHMIDT: It is a process whereby the people who ran on the March 21st primary ballots were defeated and the Challengers say they regard it as violations of the National Party rules by the organization candidates, and are entitled to get together and choose a new delegation from this district, and they will do it making an effort to represent women, young people, and racial minorities.

MR. VIRGILIO: I am a little bit unclear on the authority that the meeting was called.

MR. SCHMIDT: The meeting was called by the Ten Challengers who filed the Attempt to Challenge and the Statement of Challenge with the Democratic National Committee. Pursuant to their authority as Challengers in order to choose a new delegation, they filed with the Democratic National Committee rules for these caucuses and

are conducting the processes, and they asked me as one of their attorneys, to act as the Coordinator of this meeting.

MR. VIRGILIO: Then, the meeting would only reflect the views of the defeated candidates, and not, specifically, the views of the residents who are Democratic primary voters in the area.

MR. SCHMIDT: Well, these are the people entitled to participate—the people who ran, received votes on the March 21st primary ballots, who received votes which did not reflect actions by the party organization.

MR. VIRGILIO: There is no vehicle for participation by the Democratic primary voter.

MR. SCHMIDT: There is no way for the Democratic primary voters themselves to now cast another ballot. We're here as such. As I said, you're welcome to participate. You can contribute to the meeting as you like. You can, if you like, nominate candidates for a delegate to be voted on by those people. That's correct. Those are the rules.

MR. CLEWIS: Who set these rules?

MR. SCHMIDT: These rules were adopted by the ten people who filed the Credential Challenge and are pursuing it before the Democratic National Committee.

MR. CLEWIS: Are these the rules or is this the challenge?

MR. SCHMIDT: Well, I don't think I would put it that way, but you can if you like. I think what we are saying—what the Challengers are saying and are trying to do is to conduct by the best process possible, at this point, a delegation representative of this District.

MR. VIRGILIO: Well, how about all the votes that they received—the individual?

MR. SCHMIDT: They're going to cast a weighted vote based on the number of votes that they did receive in the March 21st primary.

MR. CLEWIS: Mr. Schmidt, am I led to believe that you're not going to follow the Democratic rules set up by the State of Illinois that are now in existence?

MR. SCHMIDT: I think that is probably—

MR. VIRGILIO: Specifically, paragraph two and paragraph three of the Democratic Rules of the Democratic Party of the State of Illinois. You're not following those rules?

MR. SCHMIDT: I would think we're not following those rules in general, or in particular. We're conducting a process in accordance with the rules adopted by the Challengers.

MR. WRONSKI: By the eleven—how many are there? Eleven?

MR. SCHMIDT: Ten Chaliengers adopted the rules and have filed them with the Democratic National Committee.

MR. VIRGILIO: We are residents of the 11th Congressional District. We would like to vote as to the other eleven candidates or delegates are attempting to do.

MR. SCHMIDT: Let me state again. Under the rules which have been adopted and filed with the Democratic National Committee, and which I have authority to interpret and conduct the meeting in accordance with, the rules provide that the votes are to be cast by the persons who ran on the March 21st ballot, received votes in that primary, and were defeated by what the Challengers regard illegal actions by the organization.

There is no basis for anybody else to cast a vote at this meeting.

MR. CLEWIS: In other words, they're not along the lines of the State Party rules governing the convention delegates.

MR. SCHMIDT: We're not conducting a process now—

MR. CLEWIS: I see.

MR. SCHMIDT: —in an effort to comply with the rules of the Illinois State Party. We're conducting a process in accordance with the rules that the Challengers have adopted, and regard as the best means at this point, given a difficult situation, to try to come up with a delegation representative of this District.

MR. WRONSKI: Are these the same rules for all the other . . .

MR. SCHMIDT: All the eleven districts are complying with the identical rules. They've been filed with the Democratic National Committee. The procedure is to be uniform, district by district, and, indeed, that is the basis on which the process has been announced and publicized in the newspapers.

MR. VIRGILIO: What official notice was given?

MR. SCHMIDT: Well . . .

MR. CLEWIS: Any legal notice?

MR. SCHMIDT: The notice was given to the people entitled to vote.

MR. CLEWIS: How?

MR. SCHMIDT: How were they actually notified? Two different ways. First by telephone and then by confirming telegram.

MR. CLEWIS: Person to person.

MR. SCHMIDT: And, they were called person to person, and they were given confirming telegrams. There was also a press conference at which the process was announced generally, and it was announced that if other persons wished to attend, they could. The places were placed in the newspapers for that reason.

As I say, we frankly did not expect this number of people to come, recognizing the fact that the vote was to be cast.

MR. VIRGILIO: In other words, you don't recognize the individual citizen that voted in the last primary. His vote actually doesn't count, does it, at all?

MR. SCHMIDT: No.

MR. VIRGILIO: Or is it recognized by you or the candidates, is that so?

MR. CLEWIS: Do you have the convention results from the March 21st? You don't go by that? The individual voter has no say-so in this?

MR. SCHMIDT: Well, I think all of us recognize the people being challenged by the Challengers were elected on March 21st. The question is whether or not that election was legal in the National Party Rules.

MR. VIRGILIO: Mr. Schmidt, you do not recognize the results of the voting of the March 21st where Anthony C. Laurino received 52,772 votes?

MR. SCHMIDT: Well, first of all let me emphasize that my role at this meeting is to act as coordinator and to conduct the meeting in accordance with rules adopted by the Challengers, and I'm not here to defend the merits of the Credentials Committee with you.

Obviously, I would say the Challengers do not accept those results. That's why they're challenging. It is their contention that they reflect illegal actions by the organization's massive support throughout the whole party apparatus—the patronage apparatus. But, that's the issue that's being decided in Washington by the Credential Committee. I'm not here to decide it.

MR. VIRGILIO: My name is John Virgilio. I wish to participate and have a vote at this meeting.

MR. SCHMIDT: Well, I'm telling you that will not be granted under the rules. You are not entitled to vote in this meeting and under the rules I would have no authority to permit you to vote in this meeting.

All I can do is conduct the process in accordance with the rules the Challengers adopted which permit the losing candidates on the March 21st ballot to cast the vote to choose their delegation.

MR. VIRGILIO: What are the names of the parties that are able to vote?

MR. SCHMIDT: Well, I can give you their names. We have a list. May I ask the purpose of the Court Reporter?

MR. VIRGILIO: We wanted to get an adequate report.

MR. SCHMIDT: Okay. Fine. Well, there are a total of about fifteen persons. Would you want me to read those names?

MR. VIRGILIO: Sure.

MR. SCHMIDT: Okay. (Mr. Schmidt read the names) James Marcinkowski, Ralph Tensza, John Mitchell, Dominic Magno, Cathy Grossmayer, Michael Holewinski, William Bobzin, Bert Bielski, Mary Gsodam, Raymond Kaepplinger, David Rothstein, Marc Slutsky, and H. R. Toch.

Those are the persons and they are entitled to a weighted voted based on the number of votes they got in the March 21st primary. They got a total of 290,757 votes.

MR. CLEWIS: In other words, this meeting is in no way intended to reflect the opinions of the overall residency of the 11th Congressional District, only the disenchantment with the process that took place March 21st by the fifteen gentlemen mentioned?

MR. SCHMIDT: Well, I would say it is the intent that those fifteen persons would make every effort to choose a delegation representative of this district. But, I

think it's clear—I said it before that they are entitled to cast the vote. Other persons, while welcome to have them attend as spectators to the extent of available space and do everything we can to make it available, these persons will cast the vote.

MR. VIRGILIO: What is your name, again?

MR. SCHMIDT: My name is John Schmidt, S-c-h-m-i-d-t. I live in the 7th District, 30 East Elm Street.

MR. CLEWIS: Were you picked by these candidates?

MR. SCHMIDT: By the Ten Credentials Challengers.

MR. CLEWIS: How did they pick you?

MR. SCHMIDT: Well, I'm one of their lawyers. They felt I would be able to understand the rules. I have no function here, other than to conduct the meeting in accordance with those rules. I don't get to vote. I don't get to say anything, and I'm responding to your inquiries.

MR. CLEWIS: By whose authority were these rules approved? By the National Democratic Party?

MR. SCHMIDT: No.

MR. CLEWIS: By the State of Illinois?

MR. SCHMIDT: No.

MR. CLEWIS: By the Democratic Party?

MR. SCHMIDT: That is an issue which is obviously going to be here before the Credentials Committee.

MR. VIRGILIO: No, that is an issue that is going to be brought up tonight.

MR. SCHMIDT: Well, I repeat, the rules were adopted by the Ten Chicago Credentials Challengers, pursuant to authority which they assumed as the Challengers to decide how a new Chicago delegation, a challenged delegation . . .

MR. CLEWIS: Unsuccessful candidates, right?

MR. SCHMIDT: No. We're not talking about the unsuccessful candidates. We're talking about Alderman Singer, Alderman Cousins, Alderman Langford . . .

MR. WRONSKI: I'm talking about the individuals from the 11th District.

MISS KENNEDY: I am one of the Challengers, and I live in this house.

MR. SCHMIDT: I'm sorry if there was confusion about the rules, because there may have been and people felt that . . . I'm sorry if there was that confusion. That is not the case, and I thought the press stories were clear on it, but if they weren't, I'm sorry.

MR. WRONSKI: Well, we appreciate the opportunity to stay as observers.

MR. SCHMIDT: We have a problem of space, and we'll do the best we can. How many people are here who were among the candidates that ran and lost on March 21st? There were fifteen names that I read off.

Well, I wonder if we could have people come up to the front and take these seats (indicating), because those are the people who are entitled to vote.

MR. CLEWIS: What is the feeling of moving from a smaller area to a larger area?

MR. SCHMIDT: I have no objection. If it's not going to be too cold out there, move it out there, and we'll move the chairs. Let's do it. Let's do it. We don't want anyone to feel that they were excluded from the meeting, and I think we should do it.

(Assembled in the backyard at 7301 North Osceola.)

MR. SCHMIDT: Any of the fifteen people who ran and were defeated in the March 21st primary here? If they would come forward and sign in and we'll give them their credentials and then we'll proceed from there in accordance with the rules.

Those people are James Marcinkowski, Ralph Tensza, John Mitchell, James Paquet, Dominic Magno, Cathy Grossmayer, Michael Holewinski, William Bobzin, Bert Bielski, Mary Gsodam, Raymond Kaepplinger, David Rothstein, Marc Slutsky, and H. R. Toch.

A number of these people said they were going to be here. I think we should wait a few minutes at least for them to arrive. Eleven had stated that they would be here, and they are the people entitled to vote, so I think we should wait a few minutes, and see if they get here.

In the meantime, I do have copies of the Rules of the meeting, here, and to the extent that I have enough copies, I'd be glad to hand them out. Pass them around.

MR. WALSH: Has the meeting officially started?

MR. SCHMIDT: No, it hasn't. I think we'll wait to see if a few more of the eligible electors . . . They say it's just 7:30 p.m. now, and we had several people who said they would be ten or fifteen minutes late. I don't want to make anyone stand in the cold, but I think we should wait for those people to arrive.

MR. CLEWIS: What time is the meeting called for?

MR. SCHMIDT: Well, we were hoping to start at 7:30, but we're going to wait.

MR. WRONSKI: As a resident of the community, I suggest that we call the meeting to order.

MR. SCHMIDT: Well, as I said before, the people entitled to vote are those fifteen persons whose names I read off. We had spoken with each of them, or those we could reach personally, and had assurances that eleven or twelve would definitely be here, and I think we should wait a few minutes.

MR. WRONSKI: Let's take this one step further. I feel as a resident of the 11th Congressional District, and a primary voter of said district, that at this time I feel that we have an equal amount of residents here who feel

the same way as I do, so we're all interested in discussing the situation of the delegates and the alternate delegates and I move at this time that we elect a permanent chairman to this group herewith, and at this time . . .

MR. SCHMIDT: If I can respond to you for the record, I'm going to have to rule you out of order, because under these rules, I have authority to do nothing more than conduct the election process in accordance with these rules as designated by the Challengers. There is no provision for the spectators present at the meeting to elect a new chairman. If you want to make a record of that kind, you're welcome to do it and leave, but I don't think we should permit that kind of action.

MR. WRONSKI: At this point, Mr. Chairman, I would like to appeal to the decision of the Chair.

MR. SCHMIDT: Well, again, we're not under Robert's Rules of Order. We're under the rules adopted by the Challengers. They vest in me as their Coordinator here, the right to interpret them and apply them, and conduct the process in accordance with them, and I don't think there's any provision for any other than the fifteen people to vote.

MR. WALSH: Well, what about the people challenging the fifteen?

MR. SCHMIDT: Well, you're welcome to file a Credentials Challenge against the people chosen in this process. The issue is going to be argued at length.

MR. CLEWIS: Mr. Coordinator, I belong to many organizations, those both covered by Robert's Rules of Order and those that are not, there has always been some sort of recourse the Chairman can take.

MR. SCHMIDT: Well, this is not an organization. This is an election process, and it's being conducted in accordance with the rules.

MR. CLEWIS: Am I to understand that we're excluded from the election process as residents and primary voters of this district.

MR. SCHMIDT: That is correct, except to the extent that you would like to stay as spectators, and you will be permitted, if you wish, to place names in nomination to be voted upon by the fifteen persons whose names I read earlier. That is the way the rules read, and that is the way I am going to apply them.

MR. CLEWIS: Mr. Chairman, can we read the statute dealing with the election of delegates?

MR. SCHMIDT: Well, you can read it, but it's not going to accomplish much.

MR. VIRGILIO: Well, we would like to read that and have it read into the minutes of the meeting, if possible.

MR. SCHMIDT: Well, I think while we're waiting for other people to arrive, if you want to read the Illinois Election Code, it's not going to hurt anything, but it's not going to accomplish anything either. If you want to make a record that you're opposed to the way we're conducting this meeting, that you don't think the challenge should succeed, that you don't think the people who are chosen here will be representative of the District . . . But, again, I don't think it's going to accomplish very much.

MR. VIRGILIO: Possibly, for the sake of brevity, we could submit, Mr. Coordinator, a copy of those rules to the Chair, and another copy to our Stenographer.

MR. SCHMIDT: You can submit them to your Stenographer. I really don't have authority to take those or make a record of any kind. I'm here to conduct a process.

MR. VIRGILIO: We would like to submit them to the Chair, and consider them read.

MR. SCHMIDT: (Indicating to one of the Challengers) Would you like to sign in? What is your name?

MR. MITCHELL: John Mitchell.

MR. VIRGILIO: (Indicating to Stenographer) Mark this for identification—Citizens Exhibit number I. (So marked.)

MR. WRONSKI: Could we get everybody present to submit their names and addresses? We would like to determine if everybody is from the 11th Congressional District.

MR. SCHMIDT: Are any of you people defeated candidates? (indicating to the people assembled) Would you come up and sign in? This will be the list of people who will be entitled to vote.

MR. VIRGILIO: Mr. Schmidt, I've marked this . . .

MR. SCHMIDT: I'm not going to accept this. I'm not a judge, here. I'm not going to decide a case. I'm going to conduct a process in accordance with the rules.

MR. WALSH: What rules are these? Can we see a copy of them?

MR. SCHMIDT: (Indicating to one of the late arrivals) Were you a defeated candidate in the . . . Who else was?

MISS GSODAM: I have no idea.

MR. SCHMIDT: Here's a copy of the Rules.

MR. CLEWIS: As Coordinator of the . . .

MR. SCHMIDT: Were you a defeated candidate on the March 21st primary?

MR. CLEWIS: No.

MR. SCHMIDT: You weren't.

MR. CLEWIS: Mr. Coordinator, there's a strong feeling amongst the people in attendance—they feel very strongly that they would like to participate in this meeting.

MR. SCHMIDT: Well, as I said before, I don't have the authority to do anything but to conduct a process in accordance with the rules. You're entitled to stay as spectators and can make nominations. The people entitled to vote are the fifteen persons who ran and were defeated by what the Challengers say were illegal actions.

MR. CLEWIS: At this time, Mr. Coordinator, I would like to make a motion that John Virgilio becomes the Chairman of this assembly.

MR. WRONSKI: I second the motion.

MR. CLEWIS: A motion has been moved and seconded that John Virgilio become the Chairman of this assembly. All those in favor, signify by saying "aye" . . . (Cries of "Aye") . . . Opposed . . . none . . .

The motion is carried.

(The motion to appoint John Virgilio Chairman of this assembly was moved, seconded, and approved by the residents and voters of the 11th Congressional District.)

MR. SCHMIDT: Well, I'm going to rule that out of order—that you don't have a meeting . . .

(Cries of the people "You're out of order")

. . . Let me say that this is a private home. This is a private home. Mr. Kennedy and his daughter, Miss Cathy Kennedy, who is one of the Challengers, offered to let us use their home to conduct a process in accordance with the rules that the Chicago Challengers had adopted. They did not offer the use of their home for a public meeting of persons for whatever nature and for whatever purpose. They did not offer their home to anyone else other than the Chicago Challengers, and I really think to seek to conduct . . .

(Cries of "It was in the paper. It said public meeting in the paper.")

MR. SCHMIDT: Let me repeat, the meeting is open to persons who want to stay as spectators and observe the proceedings and they will be permitted if they want to place names in nomination.

But, under the rules, the votes are to be cast by the persons who ran in the March 21st primary and were defeated by the illegal action of the organization.

Furthermore, the meeting is to be conducted by me as the Coordinator, appointed by the Challengers, and if we do anything other than that—I do anything other than that—we're violating the rules which the Challengers adopted, which had been filed with the Democratic National Committee, and we are violating the terms of our invitation from Mr. Kennedy which was to permit the Challengers to hold their meeting in their home.

MR. CLEWIS: With the deepest respect of the use of the house of Mr. and Mrs. Kennedy, not meaning any slight on the use of their facilities, but to state that the Democratic Party Rules which we're all operating under —we're all talking about being delegates and alternate delegates to the Democratic National Convention, the Democratic Party Rules clearly state, and I'm going to ask Mr. Virgilio at this time to read the Rules—an excerpt from the Rules that there should be adequate space, that there should be adequate participation from all members present from that adequate space.

John, will you read that, please?

MR. VIRGILIO: Article Number 2. Paragraph 3. Rules of the Democratic Party of the State of Illinois:

> "At the time and place for all public meetings of the Democratic Party of Illinois in all levels shall be published fully and in such manner as to assure the timely notice to all interested persons. Such meetings shall be held in places accessible to all Party members, and large enough to accommodate all interested persons. A minimum of seven days notice shall be given for all such instances where the Chairman shall certify that an emergency exists. Each such notice shall include whenever possible the statement of the business to be transacted at such meeting."

MR. CLEWIS: Mr. Coordinator, these are the Democratic Party Rules. They're not self-made rules by any small group that happened to get together last night or the day before. They're statutes of the State of Illinois, the rules that have been prescribed and set forth as a vehicle for us to elect delegates, and alternate delegates, which we already have, and at this time I would like to ask Mr. Virgilio to read the election results.

John, will you read those results?

MR. SCHMIDT: For your record let me state one thing. The Challengers went before Judge McGarr (phonetic spelling) several weeks ago, and they obtained from Judge McGarr an injunction against any of the challenged delegates seeking to interfere or disrupt in any way the process by which the Challengers proposed to choose their challenged delegation.

MR. CLEWIS: Do we have any delegates present?

MR. SCHMIDT: Now, that does not, by its terms, apply to you people, but an effort to disrupt this meeting, to prevent the Challengers from conducting their process in accordance with their rules is clearly covered by the spirit and intent of that injunction.

I think there is a serious argument that it would be illegal for you to continue to attempt to disrupt the meeting and to prevent me from conducting it in accordance with the rules the Challengers adopted.

MR. WALSH: Well, you're in violation with the Statutes of the State of Illinois. Well, we've got the Statutes here.

MR. SCHMIDT: Well, you're entitled to your opinion. You can raise it before the Credentials Committee. Raise it in the Illinois State Court.

MR. WALSH: Well, here's an open meeting of the people of the 11th District, and you're not from the 11th District and you're telling the people what to do.

MR. CLEWIS: Let someone from the 11th District chair the meeting.

MR. WRONSKI: We still have a Coordinator, but we already elected Mr. Virgilio as Chairman. We still have a Coordinator.

MR. SCHMIDT: Let me state that the Challengers deliberately chose a representative from each district who was not from the district, so there would be no question that he's seeking to interfere or determine the result of the process. He would not be familiar. I know none of these people. I represent the Chicago Credentials Challengers.

MR. CLEWIS: It doesn't represent us.

MR. SCHMIDT: Well, you're entitled to your opinion. You're entitled to say I don't represent you. You're entitled to state that. I think I can state for the record that there are one hundred and fifty people here, and, possibly, one hundred and forty of them don't think I represent them.

But, I'm not here to represent you. I am not here to represent you.

MR. VIRGILIO: I would like to read the following into the record:

Anthony C. Laurino—52,772 votes cast on March 21 primary

Seymour Simon—57,545 votes cast on March 21 primary
John C. Marcin—56,056 votes cast on March 21 primary
Roman C. Pucinski—72,053 votes cast on March 21 primary
James W. Marcinkowski—28,204 votes cast on March 21 primary
Ralph M. Tensza—25,179 votes cast on March 21 primary
John T. Mitchell—28,883 votes cast on March 21 primary
James Pacquet—20,584 votes cast on March 21 primary
Dominic D. Magno—20,314 votes cast on March 21 primary
Cathy Ann Grossmayer—21,567 votes cast on March 21 primary.
Michael S. Holewinski—24,248 votes cast on March 21 primary.
William J. Bobzin—18,829 votes cast on March 21 primary.
Thaddeus S. Lechowicz—37,783 votes cast on March 21 primary.
P. J. Cullerton—40,289 votes cast on March 21 primary
Richard J. Elrod—45,982 votes cast on March 21 primary
Thomas G. Lyons—42,899 votes cast on March 21 primary
Bert C. Bielski—19,351 votes cast on March 21 primary
Mary Gsodam—15,912 votes cast on March 21 primary
Raymond P. Kaepplinger—17,251 votes cast on March 21 primary.
David Rothstein—17,386 votes cast on March 21 primary.
Marc H. Slutsky—17,153 votes cast on March 21 primary.
H. R. Toch—15,896 votes cast on March 21 primary.

FOR ALTERNATIVE DELEGATES TO THE NATIONAL NOMINATING CONVENTION

Harry H. Semrow—57,100 votes cast on March 21 primary

Elden J. Stockey—31,359 votes cast on March 21 primary
Lawrence M. Freedman—34,553 votes cast on March 21 primary.
Jeanne M. Hamilton—33,704 votes cast on March 21 primary
Judith W. Mitchell—32,017 votes cast on March 21 primary
Ben E. Palmer—45,019 votes cast on March 21 primary
Rosalie A. Prestigiacomo—42,130 votes cast on March 21 primary.
Richard V. Valentino—46,067 votes cast on March 21 primary.

MR. SCHMIDT: It's obvious that they're not going to allow us to proceed with the process according to the rules, therefore, I'm going to suggest those of you who are here, who are eligible to vote, go to another room in their home, leave these people here if they want to carry on with their shenanigans, and we'll go forward under the rules. Is that all right?

MR. CLEWIS: We're residents of the District.

MR. SCHMIDT: Let me state that we have concluded. Those who are eligible to vote . . . It's clear that you people don't intend to . . . Let me state . . .

MR. WRONSKI: Are you asking the residents of the 11th Congressional District—voters in this District to leave?

MR. SCHMIDT: No, I'm not asking you to leave.

MR. WRONSKI: Well, you're asking us to leave.

MR. SCHMIDT: Those of you who are here to disrupt, to prevent us from conducting the process in accordance with the rules the Challengers have adopted which do not provide for any election of Chairman, any resolutions, any

motion, anything, but an election in accordance with these rules, which I am in power to conduct and to do anything else . . .

MR. WRONSKI: What kind of a Democrat are you?

MR. SCHMIDT: I think I am a good Democrat . . . Therefore, I think all we can do . . .

MR. VIRGILIO: Are you telling us we can not be present . . .

MR. SCHMIDT: I am telling you that you can not vote in this meeting.

MR. VIRGILIO: Are you telling us that as residents of the 11th Congressional District we can not vote?

MR. SCHMIDT: I am telling you you can not vote in this meeting. I am telling you that you can be present as spectators, but permit us to conduct the process in accordance with the rules. You can not be present, or we will not remain here while you attempt to disrupt the meeting by taking actions which are not provided for in the rules.

MR. VIRGILIO: We are not attempting to disrupt the meeting. We are attempting to participate in the meeting. Mr. Schmidt, you are preventing us from participating in this meeting.

MR. SCHMIDT: You're entitled to your opinion. I really think your position is clear at this point, and what I think we are going to do is adjourn our meeting to a room where we can conduct it without interruption, and leave you to do whatever you choose to do.

(Meeting moved to the inside of the house)

MR. SCHMIDT: They barred themselves by acting in a disruptive manner. I'm not going to say anything on the record.

MR. CLEWIS: Well, that's your opinion. I don't think anybody disrupted anything. There were some people that were talking, but that's about all.

MR. SCHMIDT: What does this sort of thing accomplish. We're going to go forward. We're going to conduct our election.

MR. WALSH: Are you going to conduct a private meeting or have a public meeting?

MR. SCHMIDT: I said I would accept a reasonable number of observers.

MR. WALSH: All of these people are observers. He's telling us we're barred.

MR. VIRGILIO: Why don't you conduct it in a public place, if you can have it?

MR. SCHMIDT: (Back on the record) No, we're not going to permit that kind of questioning. Mr. Kennedy offered us his home as a private individual and we're not going to permit that.

MISS KENNEDY: I am Cathy Kennedy. I am one of the Ten Challengers.

MR. WALSH: You are one of the Ten Challengers. Cathy, is it your wish the people who are in attendance at this meeting be allowed to attend the meeting?

MISS KENNEDY: No. Not to the point of disrupting the people who are allowed to vote.

MR. WALSH: There are approximately one hundred people in the backyard, are they invited to come into the home?

MISS KENNEDY: No, they are not.

MR. WALSH: Is anybody invited?

MISS KENNEDY: If you want to have four or five people that will sit back and not interfere with our process, they can stay.

MR. WALSH: That will limit the meeting to four or five people. Cathy, then in your estimation, is this a private meeting?

MISS KENNEDY: No, it is not a private meeting. It is a process and we are in control of the process. If you want to stay, that's fine.

MR. WALSH: Then, it's your meeting. Okay, she said enough. That's the situation. We'll leave.

MR. VIRGILIO: We are not going to leave any observers here. Miss Kennedy has indicated that she does not have the facilities for an open meeting. We feel that we are barred from participating. The hundred or so, whose names will be listed in the record.

(See APPENDIX I—List of names of people—residents and voters of the 11th Congressional District assembled for meeting.)

We are barred from voting, from participating in any matter, and we feel, therefore, that we've been asked to leave, and we are therefore, leaving and objecting to any meeting of this kind taking place to elect delegates because we feel the Constitutional rights—one's rights to vote—therefore, we are leaving and adjourning.

MR. SCHMIDT: Let me state for the record that we sought to hold the meeting in the backyard dispite the cold because of the number of people who were here, and we found that it was impossible to conduct our process in accordance with the rules because of the effort—the successful effort to disrupt that process by the organization and its precinct captains that were here in large numbers.

For that reason, we are now being forced to go forward with the process here. We have invited observers to be present and we would like them to stay, but if they choose to leave, so be it, and we will go forward in accordance with our rules.

MR. VIRGILIO: Let me reflect that there was no mention of any organizational members being present here. The members are residents of the 11th Congressional District. They were in the backyard. They had, in fact, had a quorum. They elected a chairman of their own meeting, because the Rules Committee at this particular occasion did not have sufficient membership, adjourned, barred us from the hearing of their further meeting, told us to leave four or five observers here. We feel that this is a private meeting, not a public meeting, pursuant to their own rules. We feel that we do not have a right to vote, can not participate, and therefore, we are leaving.

(At approximately 8:07 p.m. the Stenographer took the names of the persons in attendance at the Challengers Meeting.)

John Mitchell
4215 West Roscoe
35th Ward
Cathy Ann Grossmayer
3509 North Oketo
35th Ward
Ray Kaepplinger
5539 Leland
45th Ward
Mary Gsodam
7115 West Schreiber
41st Ward
Marc Slutsky
2736 West Catalpa
Mike Holewinski
4152 West Nelson
35th Ward

(The meeting of the residents and voters of the 11th Congressional District reconvened in the backyard at 7301 North Osceola.)

MR. CLEWIS: I move that the following delegates:

Anthony C. Laurino
Seymour Simon
John C. Marcin
Roman C. Pucinski
Thaddeus S. Lechowicz
P. J. Cullerton
Richard J. Elrod
Thomas G. Lyons

and alternate delegates:

Harry H. Semrow
Bem E. Palmer
Rosalie A. Prestigiacomo
Richard V. Valentino

be elected by this caucus as its representatives to the Democratic National Convention to be held in Miami on July 9, 1972.

MR. WRONSKI: I second it.

MR. VIRGILIO: All in favor signify by saying "aye" . . . (Cries of "aye") . . . Opposed . . . None. The motion is carried.

Are there any other names to be placed in nomination as delegates or alternate delegates to the National Democratic Convention to be held in Miami, starting July 9th?

UNANIMOUS: None.

MR. VIRGILIO: There being none, and no further business to discuss, do I hear a motion to adjourn?

MR. CLEWIS: I so move.

MR. WRONSKI: I second it.

MR. VIRGILIO: It has been moved and seconded. The meeting is adjourned.

(Whereupon, at approximately 8:45 p.m., the residents and voters of the 11th Congressional District adjourned their meeting.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

PEARL AGINS, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago, that she reported in shorthand the proceedings given at the taking of said meeting, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains all the proceedings given at said meeting.

Pearl Agins
COURT REPORTER

[*Entered August 2, 1972*]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL T. WIGODA, etc.,

Plaintiff,

v.

WILLIAM COUSINS, et al,

Defendants.

No. 72 CH 2288

ORDER

This cause coming on to be heard on the motion of Paul T. Wigoda, individually and on behalf of all other duly elected, challenged and uncommitted delegates and aternates to the National Democratic Convention from the 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated (hereinafter "the delegates"), by his attorneys, Jerome T. Torshen, Ltd. and Earl L. Neal, and by the duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st Illinois Congressional District (hereinafter also included in the description "the delegates"), for supplemental relief in clarification of the order of this Court herein entered on July 8, 1972, and in aid of this Court's jurisdiction and to protect and effectuate the judgment of this Court herein entered on July 8, 1972, due and proper notice being given, the cause coming before the Court as a set matter, counsel for all of the parties except those hereinafter specified on Schedule B being present, and the Court being fully advised in the premises; and

The Court having provided an opportunity to defendants and each of them to respond to the motion for supplemental relief, and having considered motions to dismiss and other motions filed on behalf of the defendants and directed to the motion of plaintiff, and having considered the pleadings and other material filed with the Court and having heard whatever evidence without limitation that the parties or any of them deemed fit and proper to present to the Court, and all parties represented by counsel having taken part in the presentation of evidence and the examination of witnesses, and no answer having been filed to the said Motion for Supplemental Relief, and the Court having considered the evidence of all of the parties hereto and the arguments of counsel including the record heretofore made in this cause at the hearing of July 8, 1972, and the findings and order of the Court entered on said date;

The Court finds:

1. On August 5, 1972, a caucus of delegates and alternates to the 1972 Democratic National Convention from each of the Illinois Congressional Districts will be held.

2. On July 8, 1972, with counsel for all parties being present, after due notice and hearing and upon full consideration of the arguments and evidence of counsel for all of the parties hereto, this Court issued its injunction as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:
>
> "1. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from acting or purporting to act as a delegate to the Democratic Convention to be held commencing on July 10, 1972,

> from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th or 11th Congressional districts of the State of Illinois or from performing the functions of delegates from the aforesaid districts including but not limited to voting in the aforesaid Convention or in official or duly designated committees thereof.
>
> "2. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from receiving or accepting any credentials, badges or other indicia of delegate status from the officials of the aforesaid Democratic National Convention or its official or duly designated committees."

3. Each of the persons named in Schedules A and B hereto, though not duly elected delegate or alternate to the Democratic National Convention, in accordance with the provisions of the Illinois Election Code, acted or purported to act as a delegate or alternate to said convention and sought to perform the functions of delegate or alternate including voting on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts.

4. If any of the persons subject to the July 8, 1972 order of this Court named on Schedule A hereto, or if any of the persons named on Schedule B hereto, which persons stand in a position identical to those named on Schedule A insofar as they claim status as a delegate, act or purport to act as a delegate from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts at the aforesaid caucus to be held on August 5, 1972, the order of July 8, 1972, heretofore entered by this Court will be subverted, the Court's decree will, in part, be nullified, the Court's jurisdiction will be undermined and plaintiff and the class he represents will be deprived of the fruits of the litigation.

5. This Court by paragraphs 8, 10, 12 and 13 of its order of July 8, 1972, has recognized that plaintiff and the delegates and alternates he represents are the only persons who have been duly elected delegates and alternates in accordance with and pursuant to the provisions of the Illinois Election Code.

6. By virtue of the foregoing, plaintiff and the delegates and alternates are entitled to supplemental relief in clarification of the July 8, 1972 order to effectuate the said order of this Court.

7. The relief herein sought as supplemental and in clarification of the relief heretofore granted to the delegates and alternates is required in the instant circumstances, and

The Court further finds:

1. Those persons referred to herein as the delegates and alternates are the only persons elected pursuant to the Illinois Election Code as delegates and alternates to the Democratic National Convention.

2. The election at which the delegates and alternates were elected was conducted pursuant to the Illinois Election Code and the Constitution of the State of Illinois and was free and equal and open to all qualified persons as candidates and voters without limitation.

3. The process by which defendants purported to become representatives of the people of the State of Illinois was secret, restrictive, discriminatory, without foundation in law and without regard or recognition to the individual citizens of the congressional districts hereinabove mentioned who voted in the election conducted pursuant to the Illinois Election Code.

4. The fact that on August 5, 1972, a caucus of delegates and alternates from each of the Illinois Congressional Districts will be held renders additional harm to

the duly elected delegates and alternates and the voters immediate and inevitably irreparable if the rights of said delegates are further interfered with.

5. Each of the defendants listed in Schedules A and B hereto is before the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Court affirms, adopts and incorporates herein by reference as if set out herein *in haec verba* its entire order of July 8, 1972, and each and every finding set forth therein.

2. That plaintiff and the delegates and alternates whom he represents and those persons herein referred to as delegates and alternates have been duly elected to their offices by the voters of their respective congressional districts in accordance with the provisions of the Illinois Election Code; that they are the only persons elected pursuant to and in accord therewith and that plaintiff and the delegates and alternates are entitled to take their seats and to participate fully in the caucus to be held on August 5, 1972, and that said participation includes the right to vote in said caucus and in duly designated committees thereof and to take part in and perform the function of delegates or alternates in any other activities in which delegates or alternates duly elected pursuant to the statutes of the State of Illinois are entitled to take part.

3. That those persons named on Schedules A and B hereto, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined from acting or purporting to act as a delegate or alternate in said caucus to be held August 5, 1972, from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th,

9th and 11th Congressional Districts of the State of Illinois or from performing the function of delegate or alternate from or on behalf of the aforesaid districts thereat including but not limited to voting in the aforesaid caucus of August 5, 1972, or in any official or duly designated committee thereof;

4. That those persons named on Schedules A and B hereto, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined from interfering with the taking of their seats in the caucus of August 5, 1972, by the duly elected delegates or alternates and from seeking or taking credentials at such meeting if any such credentials are needed, and are further enjoined from voting in said caucus or from taking part therein as delegates or alternates.

5. That the Court retain jurisdiction over this matter for the purpose of providing whatever further collateral, supplemental or clarifying relief as may be required in the premises.

6. That notice of entry of this order to counsel for the defendants shall be deemed to be notice to each of the persons on whose behalf counsel has appeared and that notice of this order may be served upon those persons in Schedule B who have not retained counsel by any persons designed by plaintiff or his counsel.

ENTER:

/s/ D. A. Covelli

Judge

Dated: August 2, 1972

[*Issued September 12, 1973*]

58096

PAUL T. WIGODA, et al., Plaintiffs-Appellees,

v.

WILLIAM COUSINS, et al., Defendants-Appellants.

Appeal from Circuit Court, Cook County.
Honorable Daniel A. Covelli, Presiding

MR. JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from an order entered in the Circuit Court of Cook County on July 8, 1972, enjoining and restraining the defendants herein from participating as delegates representing certain Congressional Districts in the State of Illinois at the 1972 Democratic National Convention which was conveyed in Miami, Florida, on July 10, 1972. Defendants also appeal from another order entered in the Circuit Court of Cook County on August 2, 1972, enjoining and restraining them from participating in a caucus of the Illinois delegation to the Democratic National Convention in order to elect the Illinois representatives to the Democratic National Committee.

The issues presented for review are: (1) whether the trial judge's assertion of jurisdiction over this matter contradicted the judgment of the U. S. Court of Appeals for the District of Columbia Circuit and the opinion of the U. S. Supreme Court, if they were binding and res judicata as to the issues in this case; (2) whether the trial court's action violated fundamental constitutional rights

of free political association of the defendants and the National Democratic Party; (3) whether courts of equity have jurisdiction over political controversies; and (4) whether the trial judge's public comments in this action display a gross bias against the defendants.

Pursuant to those provisions of the Illinois Election Code dealing with the making of nominations by political parties (Ill. Rev. Stat., Ch. 46, § 7-1 et seq.), a primary election was held in the State of Illinois on March 21, 1972. At this primary election, delegates and alternate delegates to the National Nominating Convention of both the Democratic and Republican parties were elected from each of the 24 Congressional Districts in the State of Illinois.

The plaintiffs herein are a class of 59 individuals, including Blacks, Latin Americans, women and persons between 18 and 30 years of age, who were elected in the March 21, 1972, primary election as uncommitted delegates to the National Democratic Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts. Initially, it is worthy of mention that all the plaintiffs in this appeal were required by the Election Code to file on or before January 14, 1972, nominating petitions signed by at least one-half of one per cent of the qualified primary electors of the Democratic Party residing in their respective Districts, in order to have their names placed on the March 21, 1972, primary election ballot. No challenges to the plaintiffs' petitions were raised, and the primary election was held on March 21, 1972, resulting in the election of the plaintiffs by a majority of the qualified electors of the Democratic Party in their respective Congressional Districts. Thereafter, these results, were canvassed, certified and reported in accordance with the

respective provisions of the Election Code, culminating on April 18, 1972, in the proclamation of the Secretary of State that the plaintiffs herein were the elected delegates to the Democratic National Convention from their respective Congressional Districts.

The defendants herein were initially 10 individuals who filed a formal challenge of the credentials of the plaintiffs with the Acting Chairman of the Credentials Committee of the Democratic National Party on March 31, 1972. In their challenge the defendants allege the plaintiffs were not entitled to credentials for the Convention as they were in violation of certain guidelines which had been previously set forth in the Report of the Commission of Party Structure and Delegate Selection to the Democratic National Committee, which were thereafter incorporated into Article III, Part I, of the Call of the 1972 Democratic National Convention. Specifically, the defendants alleged in their challenge that the plaintiffs were first chosen as candidates and thereafter elected to be delegates and alternate delegates based on slate-making procedures which were neither open to the public nor had rules attached thereto to attract public participation. The defendants further alleged in their challenge that the plaintiffs were chosen to the exclusion of certain minorities, namely, Blacks, Latin Americans, women, and persons between 18 and 30 years of age.

In view of the aforementioned challenge filed by the initial 10 defendants, the plaintiffs filed a lawsuit in the Circuit Court of Cook County on April 19, 1972, the first day following the Secretary of State's proclamation naming the plaintiffs as the duly elected delegates to the Democratic National Convention and also, by operation of law, the first day which the plaintiffs could so act in their

elective office. In this lawsuit, the plaintiffs sought to enjoin and restrain the defendants who had filed the challenge with the Acting Chairman of the Credentials Committee of the Democratic National Party. A motion for a preliminary injunction was set for April 21, 1972, before Judge Donald J. O'Brien. The hearing on this motion, however, was not held on April 21, 1972, because the defendants filed a petition in the U. S. District Court for the Northern District of Illinois removing the cause to that court on April 20, 1972. There the cause was then assigned to Federal Judge Hubert Will. Thereafter, on April 24, 1972, the plaintiffs filed a motion with Judge Will to remand the cause to the Circuit Court of Cook County on the ground that the initial removal to the U. S. District Court was improper as there was no federal question involved. Judge Will took the motion to remand under advisement and on May 18, 1972, he issued an opinion finding no basis for federal jurisdiction. Judge Will, however, also entered a 10-day stay on his findings in order to enable the defendants to appeal therefrom. Subsequently the U. S. Court of Appeals for the 7th Circuit denied any further stays of Judge Will's finding and on June 30, 1972, dismissed the defendants' appeal on the ground that there was no basis for allowing the defendants' initial removal from the Circuit Court of Cook County to the U. S. District Court for the Northern District of Illinois.

During the period between April 24, 1972, when the instant plaintiffs filed their motion to remand the original cause to the Circuit Court of Cook County, and May 18, 1972, when Judge Will entered his opinion finding no federal jurisdiction, the defendants herein commenced yet

another action in the U. S. District Court for the Northern District of Illinois. In that suit the defendants herein sought to enjoin the plaintiffs herein from any further prosecution of this action in the Circuit Court of Cook County as being violative of their First Amendment rights. That cause was assigned to Federal Judge Frank McGarr, who granted the instant defendants herein a series of non-reviewable temporary restraining orders which prevented any further action in the Circuit Court of Cook County, although such further action was contrary to Judge Will's findings wherein the cause was remanded to the Circuit Court of Cook County because there was no federal question, and the Federal Court therefore lacked jurisdiction. Finally, on June 9, 1972, Judge McGarr held a trial. At the conclusion of the trial a preliminary injunction was issued barring the defendants, who are the plaintiffs in the Circuit Court of Cook County, from proceeding with this action in the Circuit Court. The injunction issued by Judge McGarr was promptly appealed to the U. S. Court of Appeals for the 7th Circuit, where a hearing was held on June 29, 1972. Following oral argument, the court, acting from the bench, reversed the injunction granted by Judge McGarr and ordered that its mandate issue forthwith so as not to delay any action in the Circuit Court of Cook County. *Cousins* v. *Wigoda*, 463 F.2d 603.

In an attempt to stay this mandate from the U. S. Court of Appeals for the 7th Circuit, the instant defendants petitioned Justice William Rehnquist of the U. S. Supreme Court on July 1, 1972, for a stay order. Following the hearing, Mr. Justice Rehnquist denied the instant defendants' application for a stay, thus clearing the way for a continuation of this action in the Circuit Court of Cook

County. At this point it is necessary to mention certain other situations which were transpiring during the course of the previously discussed litigation so as to cast full and proper perspective on the continuation of the instant litigation in the Circuit Court of Cook County from which this appeal arose. These other situations were the activities of the Credentials Committee of the Democratic National Party, and certain litigation which originated in the U. S. District Court for the District of Columbia.

As previously mentioned, on March 31, 1972, the original 10 defendants to this action filed a "Notice of Intent to Challenge" with the Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention. In this "Notice" they stated their intent to challenge the seating of the 59 uncommitted delegates who are the plaintiffs in this action. Thereafter, these original 10 defendants filed a "Statement of Grounds of Challenge Against the Proposed 'Uncommitted' Delegates to the 1972 Democratic National Convention from the Districts Encompassing the City of Chicago." On May 26, 1972, almost two months after the "Statement" was filed, Cecil F. Poole, a San Francisco attorney, was appointed as hearing officer by the Acting Chairman of the Credentials Committee to conduct hearings on the challenge previously filed by the instant defendants. These hearings were conducted in Chicago on May 31, June 1, and June 8 1972, with the result being the submission of the document entitled "Findings and Reports of Cecil F. Poole, Hearing Officer to the Credentials Committee" on June 25, 1972. In his report Mr. Poole concluded the plaintiffs herein were elected in violation of certain guidelines set forth in the Call of the 1972 Democratic National Convention.

On June 30, 1972, the Credentials Committee of the 1972

Democratic National Convention, having before it the report of the hearing officer, voted to sustain the findings in the report. Moreover, the Credentials Committee recommended an "alternative" delegation chosen in private caucuses held in Chicago on June 22 and June 24, 1972, be seated to the exclusion of the duly elected delegates. The "alternative" delegation was comprised of the original 10 challengers, who were the original 10 defendants herein, and 49 other individuals, many of whom were defeated candidates for election as delegates in the March 21, 1972, primary. All 59 members of this "alternative" delegation were thereafter joined as defendants in the instant action.

Subsequently, on July 10, 1972, the question of whether to seat the duly elected Illinois delegates or to accept the recommendation of the Credentials Committee and seat the "alternative" delegation was presented to the 1972 Democratic National Convention for a vote. The Convention voted to accept the recommendation of the Credentials Committee and seat the "alternative" delegation to the exclusion of the duly elected Illinois delegation.

In mid-June, 1972, since the hearing officer appointed by the Acting Chairman of the Credentials Committee continually refused to consider questions of law concerning the legality of the Democratic Party Rules and Guidelines, a member of the plaintiff class, Thomas E. Keane, commenced a lawsuit against the Democratic National Party in the U. S. District Court for the District of Columbia to determine whether the guidelines upon which the plaintiff class had been challenged were constitutional. Although the original 10 defendants to the instant action were not made a party to this lawsuit, they sought to intervene and

the District Court granted them leave to so intervene. Following a hearing, the District Court held three of the four guidelines upon which the challenge had been raised to be unconstitutional. On immediate appeal to the U. S. Court of Appeals for the District of Columbia, this determination by the District Court was held to be premature because no action had yet been taken by the Credentials Committee on the challenge.

As previously mentioned, the Credentials Committee did render a decision on June 30, 1972, to recommend exclusion of the plaintiff delegates. In light of this action by the Credentials Committee, the District Court for the District of Columbia on July 3, 1972, once again held a hearing and found three of the four guidelines upon which the challenge had been raised to be unconstitutional. On July 4, 1972, an appeal was again taken to the U. S. Court of Appeals for the District of Columbia. The Court of Appeals on July 5, 1972, affirmed the District Court as to the constitutionality of the one guideline which had been found constitutional and issued an injunction to prevent the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County. The Court of Appeals did, however, stay its mandate for 24 hours to enable the plaintiffs to apply to the U. S. Supreme Court for a further stay. The plaintiffs applied for such a stay and also on July 6, 1972, filed a Petition for Writ of Certiorari. Following a Special Session, the U. S. Supreme Court on the evening of July 7, 1972, granted a stay of the judgment of the Court of Appeals which had enjoined the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County. The Supreme Court also took the Petition for Writ of Certiorari under advisement.

Keane v. *The National Democratic Party*, (1972) 469 F.2d 563, judgment stayed ..... U.S. .....; 34 L. Ed.2d 1.

Thereafter, following the Convention, the Supreme Court granted the Petition for Writ of Certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals for the District of Columbia to determine whether the case was moot. *Keane* v. *The National Democratic Party*, judgment vacated ..... U.S. .....; 34 L. Ed.2d 73, October 10, 1972.

On February 16, 1973, the Court of Appeals for the District of Columbia held the case as remanded by the Supreme Court moot and affirmed the judgment of the District Court for the District of Columbia.

Since the U. S. Supreme Court had stayed the judgment of the Court of Appeals for the District of Columbia which had enjoined the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County on the evening of July 7, 1972, the plaintiffs served notice on the original 10 defendants as well as those who had been joined subsequent to their election as members of the "alternative" delegation that a hearing on the original complaint would be held before Judge O'Brien in the Circuit Court of Cook County on July 8, 1972. At the hearing on July 8, 1972, the defendants moved for a change of venue from Judge O'Brien, and the case thereafter was assigned to Judge Daniel A. Covelli. Following a hearing, Judge Covelli entered certain findings of fact from the evidence which had been presented to him. Based upon these findings, Judge Covelli ordered the 59 defendants (each of whom had formally been represented by counsel who was present for the hearing and each of whom had thereby submitted himself to the jurisdiction

of the Circuit Court of Cook County) enjoined and restrained from acting or purporting to act as a delegate to the 1972 Democratic National Convention from the particular Congressional Districts involved, or from performing the functions of such delegates in the National Democratic Convention or in its committees.

Rather than seeking an appeal from this injunction, the record reflects the defendants on July 10, 1972, were seated as delegates to the 1972 Democratic National Convention representing the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts in the State of Illinois and thereafter participated as such.

Following the Convention the plaintiffs filed a motion for supplemental relief in the Circuit Court of Cook County. In this motion the plaintiffs sought to enjoin the defendants from participating in a party caucus of delegates to be held on August 5, 1972, for the purpose of selecting the Illinois representatives to the Democratic National Committee. On August 2, 1972, Judge Covelli held an evidentiary hearing in which all parties participated. At this hearing the procedure in which the defendants had been selected as the "alternative" delegation was introduced, as well as the fact that the defendants had violated the July 8, 1972, injunction by participating in the 1972 Democratic National Convention as delegates. Once again, following the hearing, Judge Covelli entered certain findings of fact in which he found the plaintiffs to be the only duly elected delegates. Thereafter the judge ordered a supplemental injunction be entered which reflected his findings of fact that the plaintiffs were the only persons entitled to participate as delegates in the August 5, 1972, party caucus of delegates, and he also re-

strained the defendants from performing any functions as delegates at such caucus. This appeal was thereafter taken from the orders of the trial court entered on July 8 and August 2, 1972.

The first issue presented for review is whether the trial court's assertion of jurisdiction over this matter contradicted the judgment of the U. S. Court of Appeals for the District of Columbia Circuit and the opinion of the U. S. Supreme Court, and whether they were binding and res judicata as to the issues in this case.

The defendants contend the trial court lacked jurisdiction to consider this cause. The basis for this contention by the defendants lies in their interpretation of the effect of the judgment by the U. S. Court of Appeals for the District of Columbia Circuit entered on July 5, 1972, wherein the Court of Appeals enjoined the plaintiffs from proceeding with this cause in the Circuit Court of Cook County. *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563. The defendants acknowledge such judgment was stayed by the U. S. Supreme Court on the evening of July 7, 1972. However, they attempt to limit the nature of the stay entered by the Supreme Court by asserting that nothing in the opinion of the Supreme Court suggests any intention whatsoever of permitting the plaintiffs to proceed with this cause in the Circuit Court of Cook County. Rather, the defendants contend the judgment of the Supreme Court staying the injunction of the Court of Appeals was intended solely to permit a determination of the issues to be made by the Democratic National Convention "free from judicial intervention." *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563, judgment stayed ..... U.S. ....., 34 L. Ed.2d 1. The opinion does not say "free from judicial intervention," but says "absent

judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee." The court was discussing the Federal Courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State Courts over their delegates. It must be recognized that the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the Illinois delegates and challengers under the Illinois Election Code.

The defendants further contend the Supreme Court's stay of the judgment of the Court of Appeals does not operate in any way to alter the binding and res judicata effect of that judgment, and thereby permit a collateral attack of that judgment in an Illinois court, specifically the Circuit Court of Cook County. The defendants would have this court accept their interpretation that the execution of the judgment of the Court of Appeals has been suspended by the Supreme Court's action, thereby barring any assertion of jurisdiction over this matter by an Illinois court.

At the outset, this court is requested to take judicial notice that the judgment of the U. S. Court of Appeals for the District of Columbia Circuit, upon which the defendants base their contention, was subsequently vacated by the U.S. Supreme Court and remanded to the Court of Appeals for further determination. *Keane* v. *The National Democratic Party*, 469 F.2d 563, judgment stayed ..... U.S. ....., 34 L. Ed.2d 1, judgment vacated U.S. ....., 34 L. Ed.2d 73. Considering first the stay order, we hold it completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed.

Then came the Supreme Court order vacating the Court of Appeals order, thereby rendering said order non-existent and a nullity, as if it never existed. It was stricken from the records and of no force or effect. Certainly such a vacated order could not be res judicata of anything. In addition there are other reasons why it is not res judicata. On February 16, 1973, the Court of Appeals determined the issues before it were moot and joined in the finding previously entered by the District Court for the District of Columbia, wherein the defendants were denied the injunctive relief which they sought. *Keane* v. *The National Democratic Party*, U.S.C.A. for the District of Columbia Circuit, Docket No. 72-1629 (1973).

For a court to apply the doctrine of res judicata or the broader doctrine of estoppel by judgment, there are certain prerequisites which must be present. To be res judicata there must not only be an identity of the parties involved but there must also, and most importantly, be an identity of the issues. For the doctrine of estoppel by judgment to lie there must minimally be an identity of issues.

Viewing the issues and parties involved herein as compared with the issues and parties in the case upon which the defendants rely, namely, *Keane* v. *The National Democratic Party*, we find a near total lack of identity as to either issues or parties. The issue which is central to the instant cause is the Illinois Election Code (Ill. Rev. Stat., 1971, Ch. 46, § 7-1, et seq.), and the right of the plaintiffs who were elected pursuant to its provisions to serve in their elective office. The issue which was central to the litigation which ensued in *Keane* v. *The National Democratic Party* was the constitutionality of the guide-

lines of the National Democratic Party, upon which the Credentials Committee for the 1972 Democratic National Convention had determined the plaintiffs herein were not in compliance. In fact, the Court of Appeals in *Keane* v. *The National Democratic Party* stated:

"No violation of Illinois law is at issue here."

Likewise, the parties in the two causes differ. The plaintiff in both causes is that same class composed of those individuals elected to be delegates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts in the State of Illinois. The defendants, however, are quite different. The defendants herein are the 59 members of the "alternative" delegation, including the original 10 individuals who initiated the challenge of the plaintiffs' right to sit as delegates filed with the Credentials Committee on March 31, 1972. The defendant in *Keane* v. *The Democratic National Party* was the National Democratic Party, although the original 10 challengers sought and were granted leave by the U. S. District Court for the District of Columbia to intervene in that case.

Another reason is most clear for this court to refuse to entertain the defendants' contention, namely, the defendants' failure to preserve their argument, based on the res judicata effect of the decision of the U. S. Court of Appeals for the District of Columbia Circuit, in the record. The Illinois Supreme Court in *Svalina* v. *Saravana*, (1930) 341 Ill. 236, stated that for an estoppel defense to act as a bar to further litigation, it must be both pleaded and proven. A thorough review of the record as related to both the July 8, 1972, and August 2, 1972, trial court proceedings reflects that the defendants neither formally pleaded nor attempted to prove their claim res judicata

based on the decision of the Court of Appeals for the District of Columbia Circuit. The record reflects the defendants entered no pleadings other than a motion to dismiss, which was filed on July 5, 1972, and upon which they chose to stand. In that motion to dismiss, defendants refer to the litigation in the District Court for the District of Columbia. However, they make no mention of the decision of the Court of Appeals upon which they rely for their res judicata contention. This is another reason why this court refuses to entertain the defendants' contention concerning the res judicata claim of the decision of the Court of Appeals for the District of Columbia.

This court is also asked to take judicial notice of the decision of the Court of Appeals for the 7th Circuit in the case of *Cousins* v. *Wigoda* (1972) 463 F.2d 603, initiated by the original 10 challengers, defendants herein, against that class of persons who are plaintiffs herein in the U. S. District Court for the Northern District of Illinois. In that decision the Court of Appeals for the 7th Circuit makes it most clear where they believe jurisdiction over the instant matter should be assumed when they state:

> "There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not . . . disputed those allegations. . . . Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues. . . . Plaintiffs have not alleged or attempted to prove they will not receive a fair trial in the courts of Illinois, or that the state judicial system will not fully honor and protect their constitutional rights."

immediately thereafter the challengers sought a stay of the Court of Appeals order from the Supreme Court of the United States. In denying the stay, Mr. Justice Rehnquist said (409 U.S. 1201, 34 L. Ed.2d 15):

> "The opinion issued by the Court of Appeals majority specifically alluded to petitioners' [the challengers'] failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to petitioners for this purpose."

The second issue presented for review is whether the trial court's action violated the fundamental constitutional rights of free political association of the defendants in the National Democratic Party.

The defendants contend their right to freedom of political activity and association as assured them under the First Amendment of the U. S. Constitution was patently abrogated by the trial court's judgment enjoining them from acting or purporting to act as delegates to the 1972 Democratic National Convention from the particular Congressional Districts involved herein. The defendants base this contention on their assertion: that the National Democratic Party formulated and adopted certain guidelines for organizing their Party; that the plaintiffs, following the filing of a challenge by 10 of the defendants and the holding of a formal hearing pursuant thereto, were found by the hearing officer to be in violation of certain of those guidelines; and, that the Credentials Committee of the 1972 Democratic National Convention adopted the findings of the hearing officer that the plaintiffs were in violation of certain of the guidelines and voted that the defendants should be seated as an "alternative" delegation in place of the plaintiffs. Based on these assertions, the defendants

conclude any attempt to prevent them from participating as delegates representing the challenged Congressional Districts would therefore violate their right, and the right of the National Democratic Party, to freedom of political activity and association as assured them under the First Amendment.

In claiming their fundamental rights have been abrogated, the defendants fail to consider certain rights of plaintiffs which have been abrogated not only by defendants' actions but also by the actions of certain representatives of the Credentials Committee of the 1972 Democratic National Convention. Initially, it is necessary for this court to state that although the purposes and guidelines for reform adopted by the Democratic National Party in its Call for the 1972 Democratic National Convention were issued, they in no way take precedence in the State of Illinois over the Illinois Election Code (Ill. Rev. Stat., 1971, Ch. 46, § 7-1, et seq.). The opening section of Article 7 of the Election Code, which deals with the making of nominations by political parties (§ 7-1), is most clear when in discussing the selection of delegates to National nominating conventions, it states:

> "§ 7-1. . . . [D]elegates and alternate delegates to National nominating conventions by all political parties, as defined in Section 7-2 of this Article 7, shall be made in the manner provided in this Article 7, and not otherwise."

The record reflects that at no time has the election of the plaintiffs been challenged by the defendants under any of the numerous provisions provided in Article 7 of the Election Code. These provisions were included in the Election Code to insure the due process rights of the participants in elections and the rights of voters would be

preserved at all stages of the elective process. On oral argument, counsel for the defendants admitted the plaintiffs were elected according to the provisions of the Election Code, and the defendants in no way contested such election under the Election Code. However, the defendants still persist in attempting to assert their right to the office of delegates to the 1972 Democratic National Convention from the particular Congressional Districts involved, and still contend that any judgment by the trial court in upholding the election of the plaintiffs by approximately 700,000 voters is an abrogation by that court of their fundamental rights of political association. We disagree with defendants' reasoning. On the one hand the defendants admit the plaintiffs were duly elected to the elective office of delegates to the 1972 Democratic National Convention, and on the other hand they state any judgment by the trial court upholding such election is a violation of their rights. The sole basis for such shallow reasoning appears to be the defendants' reliance on the findings of a hearing officer appointed by the Acting Chairman of the Credentials Committee for the 1972 Democratic National Convention to determine the merits of the defendants' challenge of the plaintiffs' election, and the action by the Credentials Committee in adopting his findings. Having reviewed the findings of the hearing officer, we conclude he erred in his refusal to consider the legal arguments, including the constitutionality of the guidelines, and by disregarding the Illinois law, all of which were raised by the plaintiffs. In view of the fact the defendants rely on a report which is blatantly violative of the plaintiffs' due process rights on its very face, and the actions of the Credentials Committee subsequent to the receipt of such report, we find it necessary to examine the action of the Convention.

In *United States* v. *Classic,* 313 U.S. 299, at 318, 61 S.Ct. 1031, at 1039, the Supreme Court said:

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative."

The Poole report ignored the State law and the fact the guidelines referred to, which state "When State law controls, the Commission recommends that State Parties make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose," and also provides, "* * * the Commission urges each State Party to adopt procedures which will provide fair representation of minority views on presidential candidates and recommends that the 1972 Convention adopt a rule requiring State Parties to provide for the representation of minority views to the highest level of the nominating process."

The people voting in the primary elected 59 delegates, including nine male and three female Blacks, and four Caucasian females, two Latin American females, and five Caucasian persons under 30 years of age, making a total of 23 delegates representing the minority views, yet the Poole report calls this "proof of actual discrimination by itself." Such a conclusion demonstrates deliberate distortion of the facts by the hearing officer.

The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code. As stated in Section 7-1 of

the Code, the election of delegates and alternates ". . . to national nominating conventions . . . shall be made in the manner provided in this Article 7, and not otherwise." Also, see *Cousins* v. *Wigoda*, 463 F.2d 603, 606 (7th Cir. 1972), application for stay denied U.S. , 34 L. Ed. 2d 15, where the court said:

> "Illinois law may control, or may affect, the manner of selecting substitutes or alternates. Indeed the Rules of the National Convention contemplate reference to state law in connection with various issues."

The Rules of the National Convention state:

> "B-6. Adequate representation of minority views on presidential candidates at each stage in the delegate selection process * * * the Commission urges each State Party to adopt procedures which will provide fair representation of minority views on presidential candidates and recommends that the 1972 Convention adopt a rule requiring State Parties to provide for the representation of minority views to the highest level of the nominating process.
>
> "The Commission believes that there are at least two different methods by which a State Party can provide for such representation * * *. Second, it can choose delegates from fairly apportioned districts no larger than congressional districts.
>
> "C-5. Committee selection process * * * the Commission requires State Parties to limit the National Convention delegation chosen by committee procedures to not more than 10 percent of the total number of delegates and alternates. * * *
>
> "When State law controls the Commission recommends that State Parties make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose."

Elections in Illinois are, by the mandate of the Illinois Constitution of 1970 (Art. 4, § 3), "free and equal." The courts have long required that primary elections be free

and open to all qualified persons. *Craig* v *Peterson*, (1968) 39 Ill.2d 191; *People* v. *Deatherage*, (1948) 401 Ill. 25, 37; *People ex rel. Breckon* v. *Board of Election Commissioners*, (1906) 221 Ill. 9.

Malone v. *Superior Court in and for the City and County of San Francisco*, 40 Cal.2d 546, 551, 254 P.2d 517 (1953); *State ex rel. Cook* v. *Houser*, 122 Wis. 534, 100 N.W. 964 (1904); *Walling* v. *Lansdon*, 15 Ida. 282, 300-303 (1908); *Walker v. Grice*, 159 S.E. 914, 917-918 (S. Car., 1931); *Kinney* v. *House*, 10 So.2d 167, 168 (Ala., 1942); *Bentman* v. *7th Ward Democratic Executive Committee*, 421 Pa. 188, 199-203 (1966); *O'Brien* v. *Fuller*, 93 N.H. 221, 228, 39 A. 2d 220 (1944); *Lasseigne* v. *Martin*, 202 So.2d 250, 255 (La. Ct. of Appeals, 1967); *Shelly* v. *Brewer*, 68 So.2d 573 (Fla. 1953); *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 So. 144, 146 (1920); *D'Alemberte* v. *State ex rel. Mays*, 56 Fla. 162, 47 So. 489, 499 (1908); *Application of McSweeney*, 61 Misc.2d 869, 307 N.Y.S.2d 88 (1970); *Currie* v. *Wall*, 211 S.W.2d 964, 967 (Tex. Civ. App., 1948); *Carter* v. *Tomlinson*, 220 S.W.2d 351 (Tex. Civ. App., 1949); *Morris* v. *Peters*, 46 S.E.2d 729, 738 (Ga., 1948); *State ex rel. Kennedy v. Martin*, 24 Mont. 403, 62 P. 588 (1900).

The right of an elected delegate to assume office is important not only to him, but to the electors of the party. In *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 So. 144, the Florida Supreme Court stated:

> "The rights acquired and the duties imposed by the primary election laws are valuable and important not only to those who acquire them under the law, but to the entire people of the State. Upon the manner in which these powers and duties are performed, depends to an appreciable degree, the welfare of the State. . . . . The rights acquired under a primary elections

law are, therefore, of the same nature as those acquired under the general election laws, and to deprive a person of the rights acquired by the former is the equivalent of depriving him of his right to hold the office." (80 So. at 146).

The primacy of state law over the decisions of a national political party convention was detailed in an early decision of the Wisconsin Supreme Court in *State ex rel. Cook* v. *Houser,* 122 Wis. 534, 100 N.W. 964 (1904). There, a dispute arose between two groups of Republican party officials, each claiming that it had held a regular and proper state convention to choose candidates for the general elections and delegates to the party's national convention. Wisconsin statutes provided for the creation of a party tribunal to make determinations and advise the Secretary of State in such disputes. The officially designated tribunal decided for one group, the national convention for the other. The court held that the determination of the national convention could not control the decision by the state tribunal authorized by statute. The court stated:

"We do not find anything in any of such cases remotely, even, sustaining the proposition that the decision of the national convention of a party is superior to the decision of a statue tribunal of the same party, where the latter tribunal is made the sole judge by legislative enactment, or otherwise.

" • • •

"In view of the foregoing, since the law of this state has provided the conditions under which the party nominees shall go upon the official ballot, how can it be reasonably said that the decision of the national convention of a party can nullify it? The answer seems so plain as not to warrant this extensive treatment of the matter. Nothing but the great importance of

the case could be held to justify it. The moment the conventions performed their work of choosing candidates, the rights of such candidates to have their names placed upon the official ballot became irrevocable privileges, subject only to the legislative condition. That such condition could be displaced by any mere party authority, either within or without the state, dignifying it as paramount to the sovereign will of the people, and so binding its courts and its special tribunal created to decide the matter, does not seem to us to have support in reason or authority." (122 Wis. at 586, 589.)

Because election to the office of convention delegate in Illinois is governed by non-discriminatory state legislation, the instant case is not merely an intraparty factional dispute to be settled by party discipline. In this case, the law of the state is supreme and party rules to the contrary are of no effect. In *Malone* v. *Superior Court in and for the City and County of San Francisco,* 40 Cal.2d 546, 254 P.2d 517 (1953), the court stated:

"The prospective witnesses contend, however, that courts will not interfere with affairs of political parties or committees and hence applicant could have no cause of action. (18 Am. Jur., Election, §§ 143, 144.) 'Where, however, statutes conferring legal rights on members of a political party have been passed, the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such question is of no binding effect. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization of rights derived from such election, the question being no longer solely a political one, but one of law of which the courts must take cognizance. The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority.' (18 Am. Jur. supra, Elections,

§ 143.) Certainly, where civil and property rights rather than politics and political dogma are involved, the court will protect them." (40 Cal.2d at 551.)

Courts are reluctant to intervene in intraparty disputes only where the right in question is not governed by statute. When, however, the subject matter is controlled by legislation, particularly the laws which provide for primary election to party office, the courts do not hesitate to assume jurisdiction. *Lasseigne* v. *Martin,* 202 So.2d 250, 255 (La. Ct. of App., 1967); 25 Am. Jur.2d, Elections, § 126, p. 811. Here the delegates were elected by a majority of the qualified Democratic electors in their respective districts. As such, under Illinois law, they are the legal representatives of the party and of the people at the Convention. As stated by the Supreme Court of this state in *People* v. *Sweitzer,* (1918) 282 Ill. 171:

> "They are elected at a direct primary election of their respective political parties in which each member of the party is entitled to exercise his choice, and they are made the legal representative of their respective parties. They are elected as the general representatives of the members of the party, and collectively they constitute the county convention for nominating candidates and may exercise all the powers of the political party in that regard." (282 Ill. 176.)

Once the delegates were chosen in a free, open and nondiscriminatory primary election, it became the legal duty of the party to carry out the mandate of the electorate. Once elected, any question of the delegates' qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts. *Allen* v. *Republican State Central Committee,* 57 So.2d 248, 251 (La. App., 1952).

A free and open election process is the cornerstone of our government. The right of a citizen to vote is a fundamental political right, preservative of all rights. *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964); *Dunn* v. *Blumstein,* 405 U. S. 330, 31 L. Ed. 2d 274 (1972); *Evans* v. *Cornman,* 398 U. S. 419, 422 (1970); *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968). The courts have consistently and jealously protected that right against denial, *Smith* v. *Allwright,* 321 U.S. 649 (1944), dilution, *Gray* v. *Sanders,* 372 U.S. 368 (1963), or even discouragement, *Williams* v. *Rhodes,* 393 U.S. 23 (1968). As stated by the Supreme Court in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966):

> "Long ago in *Yick Wo* v. *Hopkins,* 118 U.S. 356 . . ., the Court referred to 'the political franchise of voting' as a 'fundamental political right because preservative of all rights.' Recently in *Reynolds* v. *Sims,* 377 U.S. 533 . . ., we said 'Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' " (383 U.S. at 667.)

State and federal courts have gone to great lengths to open up the primary election process and to maximize the rights of citizens to participate therein. *Dunn* v. *Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274 (1972) and cases cited therein; *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Terry* v. *Adams,* 345 U.S. 461 (1953); *Rice* v. *Elmore,* 165 F.2d 387 (4th Cir., 1947), cert. denied, 333 U.S. 875 (1958); *People ex rel. Breckon* v. *Board of Election Commissioners,* 221 Ill. 9, 18-19 (1906); *People ex rel. Coffey* v. *Democratic General Committee,* 164 N.Y. 335, 341-42, 58 N.E. 124 (1900); *Bent-*

man v. *7th Ward Democratic Executive Committee,* 421 Pa. 188, 200-202 (1966); *State ex rel. Merrill* v. *Gerow,* 79 Fla. 804, 85 So. 144, 145-147 (1920); *Carter* v. *Tomlinson,* 220 S.W. 351, 355 (Tex. Civ. App., 1949).

The interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect. See *State ex rel. Merrill* v. *Gerow,* 79 Fla. 804, 85 So. 144 (1920); *Malone* v. *Superior Court in and for the City and County of San Francisco,* 40 Cal.2d 546, 254 P.2d 517 (1953); *People ex rel. Coffey* v. *Democratic General Committee,* 164 N.Y. 335, 341 (1900); *Bentman* v. *7th Ward Democratic Executive Committee,* 421 Pa. 188, 198 (1966).

The legislature of the State of Illinois has established election machinery to guarantee the broadest possible citizen and candidate participation in the nomination process by providing for election of delegates to the national conventions. The defendants cannot be permitted to frustrate the state's interest in maximizing that participation. Party rules are not a law unto themselves. *Smith* v. *Allwright,* 321 U.S. 649, 663 (1944). As stated in *People ex rel. Coffey* v. *Democratic General Committee*:

> "The dominant idea prevading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus given effect, whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation, in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downward." (164 N.Y. at 341-342.)

The Illinois Supreme Court has demonstrated that it will enforce the right of Illinois citizens to maximum participation in the process by which candidates are nominated for a public office. In *People ex rel. Breckon* v. *Board of Election Commissioners,* (1906) 221 Ill. 9, relator filed a petition for a writ of mandamus to direct the defendant Board of Election Commissioners to allow the Socialist Party to hold a primary election. The court stated:

> "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system unless he shall be chosen at a primary election, and this statute, which provides the methods by which that shall be done and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of chossing public officers, and as an election law. It is undoubtedly true, as urged by counsel for defendants, that it has become not only proper, but necessary, to provide additional safeguards and protection to the voters at primary elections, to the end that their will may be fully expressed and faithfully and honestly carried out, and any law having that object in view would naturally commend itself to the law-making power. The legitimate purpose of such a law, however, must be to sustain and enforce the provisions of the Constitution and the rights of the voters, and not to curtail or subvert them or injuriously restrict such rights." (221 Ill. at 18-19.)

The National Convention is an integral part of the process by which the President and Vice President of the United States are elected. The citizens of the state have an obvious interest in preserving the validity of their votes

for delegates to the convention. *Gray* v. *Sanders,* 372 U. S. 368, 380 (1962); *Newberry* v. *United States,* 256 U. S. 232, 285, 286 (1921); *Georgia* v. *National Democratic Party,* 447 F.2d 1271 (D.C. Cir., 1971). In *Newberry* v. *United States,* Mr. Justice Pitney stated:

> "[I]t seems to me too clear for discussion that primary elections and nominating conventions are . . . closely related to the final election . . . . So strong with the great majority of voters are party associations, so potent to the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations. . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." (256 U.S. at 285-286.)

Defendants' challenge rests on the premise they and various party functionaries are a force superior to the will of the voting majority and the votes cast for the delegates are somehow less significant than any other votes. This premise is diametrically opposed to the Illinois Constitutional guaranty of "free and equal" elections which holds that each vote is equal in its influence on the result as any other vote. *Craig* v. *Peterson,* 39 Ill.2d 191, 233 N.E.2d 345 (1968); *Moran* v. *Bowley,* 347 Ill. 148, 162-163, 179 N. E. 526 (1932). As early as 1886, the Illinois Supreme Court stated in *People ex rel. Grinnell* v. *Hoffman,* 116 Ill. 587 (1886):

> "Elections are free, where the voters are subjected to no intimidation or improper influence, and where every voter is allowed to cast his ballot as his own judgment and conscience dictate. Elections are equal, when the vote of every elector is equal, in its influence upon the result, to the vote of every other elector,—when each ballot is as effective as every other ballot." (116 Ill. at 599.)

The right to effective candidacy for public and party office is an obvious corollary to the right to vote. *Hadnott* v. *Amos,* 394 U.S. 358, 364 (1969); *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968); *Gonzales* v. *City of Sinton,* 319 F. Supp. 189, 190 (S. D. Tex., 1970); *Stapleton* v. *City of Inkster,* 311 F. Supp. 1187, 1189-1190 (E. D. Mich., 1970); see also "Constitutional Safeguards in the Selection of Delegates to National Nominating Conventions," 78 Yale L. J. 1228, 1247-1249 (1970). As stated by the District Court in *Gonzales*:

> "It is equally certain that, to be guaranteed the full extent of the rights acknowledged by these franchise cases, plaintiffs must be granted the concomitant right to stand for office. A resident's vote for the candidate of his choice may have little meaning if no candidate speaks for the interests of that voter . . . ." (319 F.Supp. at 190.)

The right of the challenged delegates to stand for office is a right protected by the equal protection clause, *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968); *Moore* v. *Ogilvie,* 394 U.S. 814 (1969), and by due process, *Williams* v. *Rhodes,* 393 U. S. 23, 41 (1968), (Harlan, concurring); *Briscoe* v. *Kusper,* 435 F.2d 1046, 1053-1054 (7th Cir., 1970).

We think the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats in the Convention and most certainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate. Such action is an absolute destruction of the democratic process of this nation and cannot be tolerated.

Since the plaintiffs were admittedly elected to the position of delegates to the 1972 Democratic National Convention by operation of the Election Code, an Illinois statute, this court finds the trial court's injunctions did not abrogate defendants' fundamental constitutional rights of free political association. Rather, we find the due process and equal protection rights of the plaintiffs and approximately 700,000 voters have been abrogated by the actions of the defendants.

The third issue presented for review is whether the courts of equity have jurisdiction over political controversies.

The defendants contend the action of the trial court in granting both the July 8, 1972, and August 2, 1972, injunctions was patently contrary to established Illinois law that courts of equity have no jurisdiction over political controversies. In presenting this contention for consideration, the defendants rely heavily on the decision of the Illinois Supreme Court in *People* v. *McWeeney,* (1913) 259 Ill. 161, a case in which both an injunction, issued to bar certain individuals from interfering with a city political meeting, and contempt proceedings, held subsequent to the violation of the injunction, were overturned by the Supreme Court.

This court finds no merit in defendants' contention that the trial court's action violated an established principle of Illinois law. The defendants' reliance on the decision in *People* v. *McWeeney* is not well taken since *People* v. *McWeeney,* in which no statute was in issue, most clearly states:

> "The general rule is well established that the judicial department of the government has no right to interfere with or attempt to control a citizen in the exercise of political rights unless the jurisdiction is expressly given by statute or by clear implication."

The people of this state have a right to rely on a statute and the courts have a duty to follow the terms of a statute.

The plaintiffs, as the defendants have admitted, were elected according to the provisions of the Election Code and were duly certified according to the provisions of the Election Code to be the delegates to the 1972 Democratic National Convention from their respective Congressional Districts. This court, therefore, finds both the statute and the requisite "clear implication" called for by the Supreme Court in *People* v. *McWeeney* present for a court of equity to take jurisdiction over this controversy.

The final issue presented for review is whether the trial judge's public comments on this action display a gross bias against the defendants.

The defendants contend that certain comments attributed to the trial judge display such bias against the defendants as to call the courts of this state into disrepute. The defendants further contend these comments demonstrate the defendants did not receive a fair hearing as guaranteed by the due process and equal protection clauses of both the U. S. Constitution and the Constitution of the State of Illinois. The basis for defendants' contention is certain newspaper articles in which statements attributed to the trial judge reflect what the defendants contend to be gross bias against them on his part.

The record reflects the trial judge, having received the instant cause on July 8, 1972, subsequent to a change of venue taken by the defendants from another Circuit Court judge, held a hearing in which both plaintiffs and defendants participated. At the conclusion of the hearing the trial judge issued the first of two injunctions barring

the defendants from acting or purporting to act as delegates to the 1972 Democratic National Convention. At no time prior to or during the course of the hearing on July 8, 1972, did the defendants present a motion for change of venue from the trial judge. Such motion was made by the defendants on July 20, 1972, nearly two weeks later. At that time the trial judge responded to the defendants' counsel regarding the comments attributed to him in those newspaper articles published subsequent to July 8, 1972, and thereafter denied the motion for change of venue to Lake County. The Illinois Venue Act (Ill. Rev. Stat., Ch. 146, § 8) clearly states:

> "§ 8. Neither party shall have more than one change of venue."

In view of this statutory section, and since the defendants' motion for a second change of venue was not made until 12 days after a hearing on the merits from which an injunction had issued, this court finds no merit in the defendants' contention that the public comments attributed to the trial judge in newspaper articles subsequent to their original hearing precluded them from receiving a fair hearing.

For the reasons stated herein, the orders of the Circuit Court of Cook County are affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

Supreme Court, U. S.
FILED
FEB 12 1974
ROBERT ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1106

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents, Paul T. Wigoda, et al., respectfully pray that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the Illinois Appellate Court entered in this proceeding on September 12, 1973.

OPINION BELOW.

The opinion of the Illinois Appellate Court, 14 Ill. App. 3d 460, 302 N. E. 2d 614 (1st Dist., 1973), and the orders of the Circuit Court of Cook County in No. 72 CH 2288 (unpublished) appear in the Appendix to the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether the courts of the State of Illinois, which state by statute requires free, equal and open election for delegates to national political conventions, and which state, according to unchallenged findings of fact held such an election, may enjoin citizens of Illinois, not chosen by the electorate, from participating in a convention *as representatives* of the electorate.

2. Whether the courts in Illinois may protect the state's electoral code and the integrity of the electoral process.

3. Whether the courts of Illinois may enjoin acts which violate the state's election laws and which subvert said laws, and nullify the votes cast therein by the voters.

4. Whether there are real, as opposed to moot and now abstract constitutional issues in this case, since the convention has passed, the petitioners attended the convention as delegates and the Democratic Party rules, which give rise to the litigation, are in the process of revision.

5. Whether petitioners must obey a court order even if it is ultimately found to be incorrect.

STATEMENT OF THE CASE.

The chronology of the instant litigation is stated in the opinion of the Illinois Appellate Court reported at 14 Ill. App. 3d 460, 302 N. E. 2d 614 (1st Dist., 1973). (Appendix B-1) Brief additional comment should be made.

Petitioners misstate the injunction issued against them. Petitioners state (Pet. 2, 13, 23) that they were enjoined "from

participating in the Democratic National Convention." This is untrue. Petitioners, on unchallenged findings of fact after trial, were enjoined "from acting or purporting to act as a delegate to the Democratic Nominating Convention . . . from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional District of the State of Illinois or from performing the functions of delegates from the aforesaid districts . . ." (App. I-6, I-7). They were not barred from the Convention, nor was the Convention or the Democratic Party restrained in any way.

Petitioners ignore and avoid the Findings of Fact made by the trial court to support the issuance of its injunctions. These findings, which were not objected to after trial and which remain unchallenged on review are found in Appendices J and K.

On page 12 of the Petition, petitioners quote from District Judge Hubert L. Will's opinion in *Wigoda* v. *Cousins*, 342 F. Supp. 82, *aff'd per curiam* (7th Cir., 1972).

Judge Will had before him only the question of the propriety of removal. Arguments concerning the merits of the case were not made to him either orally or in writing. His statement concerning his view of the merits, recited by petitioners (Pet. p. 12), was wholly gratuitous and not the result of adversary presentation. In affirming *per curiam*, the remand by Judge Will, the Court of Appeals specifically excluded any expression of opinion concerning the merits of the case stating:

> "We express no opinion as to the effect of state law on the determination of proper delegates to the Convention." (Appendix I hereto, p. A-2)

The only injunction approved against the instant case by a court of review was that issued by the Court of Appeals for the District of Columbia on appeal in *Keane* v. *National Demo-*

cratic Party, 469 F. 2d 463 (D. C. Cir. 1972). That case was commenced in the United States District Court for the District of Columbia against the National Democratic Party by a delegate other than Wigoda and prior to a class determination in the instant case to obtain a determination that certain rules of the party such as those requiring racial quotas, etc. were unconstitutional. Certain of the petitioners in the instant case intervened in that proceeding. These certain petitioners and the Democratic National Committee moved the District Court to enjoin the instant proceedings. The District Judge (Hart) denied both prayers for the injunction. On appeal, the Court of Appeals for the District of Columbia entered the injunction. It was this injunction which was stayed by this Court upon application by Keane in *Keane* v. *National Democratic Party*, 409 U. S. 1 (1972). It should be noted that the Court of Appeals for the District of Columbia stated in its opinion in *Keane* in enjoining the prosecution of the instant action, 469 F. 2d at p. 572:

"No violation of Illinois law is at issue here."*

The instant case concerns the power of an Illinois court to prevent violation and subversion of Illinois law. Moreover, when the Court of Appeals for the District of Columbia, upon direction from this Court thereafter considered the mootness of the *Keane* case, it reinstated the judgment of the District Court which expressly refused to issue the injunction that petitioners here claim effectively barred the instant proceedings. (Appendix E.)

It should be remembered that, because of the delays encountered in the United States District Court for the Northern District of Illinois, matters concerning the Illinois delegation to the Democratic National Convention were considered on an expedited basis. This Court, in fact, held a Special session in

* Petitioners, in their appendix, erroneously state on page B-14 that this statement was made by "the trial court."

Keane and ruled on matters before it in approximately 36 hours. The injunction in the instant matter was issued by the Circuit Court of Cook County more than 48 hours prior to the commencement of the Democratic National Nominating Convention. The Rules of the Supreme Court of Illinois expressly provide for an expedited review of injunctions enabling one judge of a reviewing court to issue a stay. See S. H. A. Ch. 110A, §§ 302(b), 305(b), Ill. Sup. Ct. Rules 302(b) and 305(b). However, petitioners did not appeal nor make application for such a stay. They took no action whatever to seek review the injunction issued by the Circuit Court of Cook County until long after they had violated it and a second injunction had issued. Only then, twenty-six days after the Circuit Court acted did they seek expedited review. At such late date, their request was deni d by the Illinois Supreme Court. (Appendix B hereto)

Thus, not only did petitioners fail to challenge any of the findings of the Circuit Court at any stage of the proceedings, they also failed to seek review until after they violated the injunction issued by the Circuit Court.

Last, certain historical facts should be mentioned. After the Democratic National Convention concluded, the Vice Presidential candidate chosen by the convention (Senator Thomas Eagleton) withdrew. The Democratic Party reconvened its representatives to choose a new candidate. At this "reconvened" or "mini-convention", the various states were represented by their representatives to the Democratic National Committee. Insofar as Illinois was concerned, the representatives to this mini-convention were not chosen by petitioners here, but respondents at a state caucus from which petitioners here were enjoined from representing the Congressional Districts. The Democratic Party recognized as representatives from Illinois those persons chosen by the caucus which included

respondents. Subsequently the party has fully recognized as legitimate representatives from the State of Illinois on the Democratic National Committee only those persons chosen by that caucus. There is thus no present conflict between the Democratic Party and the Illinois Election Laws.

Subsequent to the Convention, the Democratic Party has authorized a re-examination and revision of its rules concerning delegate selection. This is in process.

ARGUMENT.

I.

The Illinois Appellate Court Properly Upheld the Application of the Illinois Election Code.

The instant case concerns the ability of the State of Illinois to protect its electoral process. The Circuit Court of Cook County, on proper application and after due notice and hearings in which all parties appeared, participated and were represented by counsel, entered the injunctions herein to protect the electoral process and the candidates and voters who participated therein. Comprehensive findings of fact were made. (App. I and J) None of the findings have ever been challenged *at any level* by petitioners. These unchallenged findings demonstrate that further review is not warranted.

Illinois, by statute, requires that delegates to the national nominating convention of political parties be elected. Ill. Rev. Stat. Ch. 46, § 7-1. The election held for delegates to the 1972 national Democratic nominating convention "was conducted pursuant to the Illinois Election Code and the Constitution of the State of Illinois and was free and equal and open to all qualified persons as candidates and voters without limitation." (App. J-5) Respondents "were elected in a free, equal, open and non-discriminatory election in which, *in accord with stipulations made by [petitioners], anyone could run for office and any qualified person could vote*. In said election, there were 180 candidates for 62 delegate seats [from the Congressional districts herein involved]." (App. I-5) (Emphasis supplied.) There were no challenges made to *any* candidate who stood for the office of delegate at any stage of the electoral process. (App. I-3, I-4) (Emphasis supplied.)

Petitioners "established themselves solely on the basis of their own authority to select delegates from [the particular Illinois

Congressional districts herein involved] and without any legal justification or authority from any other people or the laws of the State of Illinois." (App. I-5) "The process by which [petitioners] purported to become representatives of the people of the State of Illinois was secret, restrictive, discriminatory, without foundation in law and without regard or recognition to the individual citizens of the Congressional districts hereinabove mentioned who voted in the election conducted pursuant to the Illinois Election Code." (App. J-5)

On the above unchallenged findings of fact, the Circuit Court of Cook County, "enjoined and restrained [petitioners] from acting or purporting to act as a delegate to the Democratic National Convention . . . *from or on behalf of* the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th or 11th Congressional Districts of the State of Illinois or from performing the functions of delegates *from the aforesaid districts*, including but not limited to voting in the aforesaid convention or in official or duly designated committees thereof." (App. I-6, I-7) Subsequently, after petitioners deliberately violated the original injunction (App. J-3) the Circuit Court enjoined them "from acting or purporting to act as a delegate or alternate [in a caucus held in Chicago, Illinois] *from or on behalf of* the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois or from performing the function of delegate or alternate *from or on behalf of the aforesaid districts* [at said caucus] . . ." (J-6) (Emphasis supplied)

The limited injunctions entered by the Circuit Court, which were intended only to prevent petitioners from acting as representatives of the electorate of certain specified Illinois congressional districts which had chosen others to so serve, do not merit review by this Court on certiorari.

As noted by the Illinois Appellate Court, Wigoda commenced the instant action on April 19, "the first day which the [respondents] could so act in their elective office." (App. B-4) Wigoda consistently sought to be heard on his claims brought

to prevent violation of the Illinois Election Code. Because of the various injunctions entered against Wigoda at petitioners' instance, Wigoda could not obtain a hearing on his claim until July 8. Petitioners urge, however, that even on that date for reasons of *res judicata*, there should have been no hearing. Petitioners, however, cite no authority to support invocation of the doctrine of *res judicata* to bar the presentation of issues which were at no time previously heard. The Court of Appeals for the District of Columbia enjoined the Illinois state court from hearing questions concerning illegal violations of state law even though no violation of state law was before the Court of Appeals. This Court thereafter unconditionally stayed the judgment of the Court of Appeals. It is not reasonable to contend that this Court's explicit stay of an injunction against the proceedings in the Circuit Court of Cook County, was, in fact, intended to enjoin such proceedings in that court. Petitioners' interpretation does violence to the plain language of this Court's stay order.

Subsequent to this Court's ruling, petitioners on at least three occasions moved the Court of Appeals for the District of Columbia to enjoin the instant case. When petitioners sought to enjoin the Circuit Court a second time, the Court of Appeals found:

> "Whereas on July 7, 1972, the Supreme Court of the United States stayed the judgments of this court entered herein July 5, 1972 and
>
> "Whereas we think doubts suggested by [petitioners] as to the scope of the stay entered by the Supreme Court should be resolved by interpreting the Court's stay as suspending the operation of the injunction issued by this court July 5, 1972,
>
> "The Emergency Motion for a rule to show cause is denied;" (Appendix III hereto).

The instant case actually concerns nothing more than the administration of a state's electoral process. As recently stated by this Court: " . . . Administration of the electoral process is

a matter that the Constitution largely entrusts to the states." *Kusper* v. *Pontikes*, ... U. S. ....., 42 L. W. 4003, 4005 (decided Nov. 19, 1973). It is well settled Constitutional doctrine that a state may prescribe reasonable and non-discriminatory election procedures for voting at all stages of both state and federal elections.

Similarly, the Court of Appeals for the Seventh Circuit in the course of this litigation stated:

> "There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not yet disputed those allegations, but retains the right to do so. Moreover, assuming vacancies in the slate of delegates may occur, by death, resignation, or by the successful prosecution of one or more challenges before the Credentials Committee of the National Convention, Illinois law may control, or may affect, the manner of selecting substitutes or alternates. Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues." (*Cousins* v. *Wigoda*, 463 F. 2d 603, 606 (7th Cir., 1962).

In the instant case, both sides agree that the election held in Illinois for the selection of delegates was free, equal and open to all. Delegates were elected from fairly apportioned congressional districts. (Illinois Congressional districts had only recently been reapportioned in accord with an order of a federal three judge court. See *Skolnick* v. *State Electoral Board of Illinois*, 336 F. Supp. 839 [N. D. Ill. E. D., 1971].

The overwhelming weight of authority demonstrates that, where the right to political party office is regulated by a fair and non-discriminatory statute, the internal decisions or rules of party officials cannot divest a person duly elected in accordance with law of the right to hold such office. *Malone* v. *Superior Court in and for the City and County of San Francisco*,

40 Cal. 2d 546, 551, 254 P. 2d 517 (1953); *State ex rel. Cook* v. *Houser*, 122 Wis. 534, 100 N. W. 964 (1904); *Walling* v. *Lansdon*, 15 Ida. 282, 300-303 (1908); *Walker* v. *Grice*, 159 S. E. 914, 917-918 (S. Car., 1931); *Kinney* v. *House*, 10 So. 2d 167, 168 (Ala., 1942); *Bentman* v. *7th Ward Democratic Executive Committee*, 421 Pa. 188, 199-203 (1966); *O'Brien* v. *Fuller*, 93 N. H. 221, 228, 39 A. 2d 220 (1944); *Lasseigne* v. *Martin*, 202 So. 2d 250, 255 (La. Ct. of Appeals, 1967); *Shelly* v. *Brewer*, 68 So. 2d 573 (Fla. 1953); *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 So. 144, 146 (1920); *D'Alenberte* v. *State ex rel. Mays*, 56 Fla. 162, 47 So. 489, 499 (1916); *Application of McSweeny*, 61 Misc. 2d 869, 307 N. Y. S. 2d 88 (1970); *Currie* v. *Wall*, 211 S. W. 2d 964, 967 (Tex. Civ. App., 1948); *Carter* v. *Tomlinson*, 220 S. W. 2d 351 (Tex. Civ. App., 1949); *Morris* v. *Peters*, 46 S. E. 2d 729, 738 (Ga., 1948); *State* v. *Martin*, 24 Mont. 403, 62 Pac. 588 (1900).

Certainly it cannot reasonably be argued that an illegally chosen delegation cannot be barred by the courts from coopting the rights of those lawfully chosen.

II.

There Is No Legitimate Question Raised Here Concerning Petitioners' Right of Association.

This case does not concern petitioners' "right of association." (See Petition, page 32.) It is significant that the Circuit Court's order did not bar petitioners from "associating" with the Democratic Party nor, in fact, did it bar them from the Convention. The injunction entered by the Circuit Court barred petitioners from acting or purporting to act as delegates from or on behalf of certain specified Illinois congressional districts. Petitioners by their own admission, were not elected by the people of those districts to represent them at the convention. The Circuit Court was rightfully concerned that the

State's electoral process not be subverted or that representatives be chosen in some manner not permitted by State law.

However, the Circuit Court did not seek to prevent the Convention from giving status to petitioners. It did not seek to prevent petitioners from acting at the Convention in some other capacity. The court sought only to preserve the electoral process in the State of Illinois by insuring that no one would be foisted upon the people of the State as representatives who were not, in fact, chosen by the people. This is the only proper policy in a democratic government. As stated in *People ex rel. Coffey* v. *Democratic General Committee:*

> "The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot, and thus given effect, whether it be in accord with wishes of the leaders of his party or not, and that thus shall be put in effective operation in the primaries, the underlying principal of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downward." (164 N. Y. at 341-342, 58 N. E. at 126 [1900]).

Petitioners do not claim that the Illinois Election Code is discriminatory or that the election was unfair or improperly administered. The Illinois Appellate Court properly upheld the validity and applicability of the statute against the contention that a private group of self appointed citizens could usurp the power of the state electorate.

III.

There Has Been No Showing of Bias by the Trial Court.

Petitioners were afforded a fair hearing before an experienced trial judge. Their claim that he was biased does not stand analysis. After employing every means available to prevent the

Circuit Court from hearing this case, petitioners, when the case was finally reached for trial two days before the Convention, moved, on the basis of an article which appeared in a Washington, D. C. newspaper, for a change of venue from Judge Donald J. O'Brien, the Chief Judge of the Chancery Division of the Circuit Court. The record shows that Judge O'Brien granted the motion after making diligent attempts to obtain a judge so that plaintiffs could have their day in court. On Saturday afternoon, Judge Covelli was reached at his home and came to court. Petitioners made no motion to disqualify Judge Covelli.

Petitioners took part in the trial before Judge Covelli. Most of the evidence was uncontested, and petitioners did not object to the findings which Judge Covelli made after hearing evidence and examining the record. Nor did they seek an immediate appeal from his order even though specific procedures were available to them to do so. Instead, as found in the August 2 hearing, petitioners, in violation of the court's July 8th order, "acted or purported to act as delegate or alternate to said Convention and sought to perform the functions of delegate or alternate including voting on behalf of the various congressional districts herein involved." (App. J3-4)

It was only after petitioners had violated Judge Covelli's order that they sought a change of venue from him, again (as with Judge O'Brien) basing their demand upon unverified newspaper articles.

Judge Covelli responded from the bench to charges made against him in defendants' second motion for a change of venue. We reprint here, in pertinent part, the remarks of Judge Covelli:

> "Insofar as the statements are attributed to me I did tell a young reporter part of it. It was two minutes to ten. I had my robe on and I was coming out here to work. This young reporter came in and said, 'Judge, will you please give me a statement?'
>
> "I said, 'I have got to go to work.'
>
> "He said, 'Well, Judge, if I don't get a statement I might get fired.'

"So I said, 'All right, sit down.'

"So he sat down and he said, 'What are you going to do about this?'

"I said, 'I can't do anything about it. I am the referee, I am the umpire. There is nothing I can do until or if a petition is presented.'

"He said, 'Well, what can they do in Florida?'

"I said, 'Well, every lawyer knows that the Federal Constitution says that each state must give full faith and credit to the decrees of another sister state.' And I said, 'The case of Rule v. Rule, 313 Illinois Appellate 108, although it is a divorce case establishes that law.' And I said, 'In my opinion the Daley outfit can file a petition in the court in Florida attaching a copy of my injunction writ and ask that court to enforce it.'

* * * * *

"Insofar as the other statement attributed to me, I did not make that statement to this reporter. What happened was I received a phone call while he was sitting in my chambers from a citizen. I have received several of them about this case. And I told all of them the same thing: There is nothing I can do, I cannot initiate any action and I don't intend to. Some of our citizens don't understand that.

"This particular man, whomever he was, said to me over the phone, 'Well, don't you think that Mr. Singer, delegating himself the powers that he has, has acted like Hitler in Germany and Mussolini in Italy?'

"And I said, 'Oh, come now, I am busy, I have got to go to work.'

"And he said, 'Well, don't you agree with me?'

"And I said, 'Yes.'

"And he said, 'No, I want you to tell me how you agree with me.'

"So I repeated those words that he used on the telephone, and this reporter, being a young man, didn't know that he had no right to quote me because I didn't say this to him, I said it on the telephone.

"Now, he came in to see me this morning and asked me what it was all about, and I told him. * * *"

Judge Covelli explained each of the remarks which he allegedly made. His remarks were taken wholly out of context and totally misconstrued. Judge Covelli's statement is unchallenged. It does not demonstrate bias. It does not demonstrate that petitioners did not receive a fair trial. In fact, petitioners did not in any way, seek to show that Judge Covelli's explanation was incorrect or untrue. The fairness and adequacy of the hearing is best demonstrated, not by the trial judge's subsequent remarks, but by petitioners' failure at any stage of the proceedings to object to the findings of fact which led to the injunction. On these uncontested findings, no reasonable judge could do anything less than enter an order preventing petitioners from superseding representatives duly chosen by the people and, on their own authority, seeking to act as such representatives.

IV.

This Case Presents Moot and Abstract Questions.

The Convention is now long over. Petitioners attended the Convention and represented the various congressional districts, albeit in violation of the Circuit Court's order. Obviously, therefore the question of whether they can attend is not before the Court. The Democratic Party Rules are in the process of being revised and replaced by the Party. This case arose out of an *ad hoc* situation, and petitioners have made no showing that the unique facts which gave rise to the case are likely to occur again. Thus, the constitutional questions, even as phrased by petitioners, are moot and abstract; they present no real case or controversy. In this posture, the petition presents no overriding constitutional questions of sufficient importance to warrant consideration by this Court at this late date. Nor have petitioners demonstrated any present or future harm from the Circuit Court's orders. Although contempt proceedings are

presently pending in the Circuit Court for the violation of the first injunction here challenged, it is clear under the law that such proceedings are proper. Well-settled principles would justify contempt proceedings here even if the order of the Circuit Court had been erroneously, or unconstitutionally, entered. *United States of America* v. *United Mine Workers*, 330 U. S. 258, 293, *concurring opinion*, 330 U. S. 309, 310 (1947); *Walker* v. *Birmingham*, 388 U. S. 307, 320-321 (1967); *United States* v. *Dickinson*, 465 F. 2d 496, 476 F. 2d 373 (5th Cir., 1973), *cert. denied*, ... U. S. ....., 42 L. W. 3247 (1973). As stated by the Court of Appeals in *Dickinson*:

> "We begin with the well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction *must be obeyed*, irrespective of the ultimate validity of the order. Invalidity is no defense to criminal contempt. [citing cases] 'People simply cannot have the luxury of knowing that they have a right to contest the correctness of the judge's order in deciding whether to willfully disobey it. * * * Court orders have to be obeyed until they are reversed or set aside in an orderly fashion.' Southern Railway Co. v. Lanham, 5th Cir., 1969, 408 F. 2d 348, 350 (Brown, cj, dissenting from denial of rehearing *en banc*)" (365 F. 2d at 509, emphasis the Court's)

Thus, even if this Court were to find that the Circuit Court's order was unconstitutional, that finding would not invalidate the contempt proceedings. As stated by the Court of Appeals in *Dickinson*:

> "Absent a showing of 'transparent invalidity' or patent frivolity surrounding the order, *it must be obeyed* until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process, regardless of the ultimate determination of constitutionality, or lack thereof." (465 F. 2d at 509-510, emphasis the Court's)

It is significant that petitioners do not claim that the Circuit Court's order was patently frivolous or transparently invalid.

Indeed, even if such claim were made, the affirmance of the Circuit Court's decision by the Illinois Appellate Court demonstrates that, at the very least, reasonable judges could reasonably disagree with petitioners as to the constitutional questions and that the injunctions, even if constitutionally deficient, were not patently or transparently invalid. Thus, the pendency of contempt proceedings in the Circuit Court does not convert the correct decision of the Illinois Appellate Court into overriding actual constitutional questions of sufficient currency or import to merit review by this Court.

CONCLUSION.

For the foregoing reasons, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX I.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

June 30, 1972

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

PAUL T. WIGODA, ETC.,
Plaintiff-Appellee,

vs.

WILLIAM COUSINS, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(72 C 1001)

This cause is before the Court on the motion of the appellants requesting the Court to reconsider its order of June 7, 1972, dissolving its stay of the remand order of the district court and that upon such reconsideration, the remand order be stayed pending appeal.

The only issue presented on this appeal is whether the district court erred in determining that the appellants were not entitled to remove the case below from the Circuit Court of Cook County, Illinois, to the Federal District Court for the Northern District of Illinois and ordering that the cause be remanded to the state court.

A brief in support of their position has been filed by the appellants who, because of time factors involved in this litigation, have requested consideration on an expedited basis.

Upon consideration of the matter before us, and the arguments presented in appellants' brief, we are of the opinion that no worthwhile purpose would be served by suspending the decision of this Court until the filing of the appellee's brief.

Accordingly, being duly advised in the premises, the reasoning and result set forth in the memorandum opinion of the district court is now adopted as the opinion of this Court and the order of the district court is affirmed and this appeal is dismissed.

We express no opinion as to the effect of state law on the determination of proper delegates to the Convention.

APPENDIX II.

IN THE SUPREME COURT OF ILLINOIS
In Vacation After the May 1972 Term.

PAUL T. WIGODA, ETC.,
Plaintiff-Appellee,

vs. } No. .....

WILLIAM COUSINS, ET AL.,
Defendants-Appellants.

ORDER.

This matter comes on to be heard upon an emergency application for direct appeal and for emergency relief which was filed after 4:15 P. M. on August 3, 1972, on behalf of William Cousins, et al., and also upon an emergency application for direct appeal and for emergency relief which was filed on behalf of Samuel Ackerman, et al., at approximately 10:00 A. M. on August 4, 1972.

The emergency relief that is sought consists of:

(1) the transfer of appeals from orders entered in the Circuit Court of Cook County on July 8, 1972, and August 2, 1972, from the Appellate Court, First District, to this Court, and

(2) the entry of an order "staying forthwith, pending appeal, the enforcement, force and effect of" orders entered by the Circuit Court of Cook County on those dates.

Although the basic judgment order involved in this case was entered in the Circuit Court of Cook County on July 8, 1972, Notices of Appeal from that order were not filed until August 3, 1972, and August 4, 1972, respectively.

It appears from the voluminous documents that have been filed that the matters involved in this case have heretofore been presented to and considered by two United States District Courts, the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States. It is further apparent that those matters are complex and that the delay in bringing the case to this Court has so curtailed the time available that disposition of those matters on the merits in a fair and intelligent manner is impossible.

It Is Therefore Ordered that the applications for emergency relief are denied.

Enter:

/s/ ROBERT C. UNDERWOOD,
Chief Justice

/s/ WALTER V. SCHAFER,
Justice,

/s/ THOMAS E. KLUCZYNSKI,
Justice,

/s/ DANIEL P. WARD,
Justice,

/s/ HOWARD C. RYAN,
Justice.

APPENDIX III.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

September Term, 1971
Civil 1320-71 and 1010-72

No. 72-1631

THOMAS E. KEANE,

vs.

NATIONAL DEMOCRATIC PARTY, ET AL.,
WILLIAM COUSINS, ET AL.,

Appellants.

Before: BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and MACKINNON, *Circuit Judge*.

ORDER.

On July 28, 1972, appellants filed a motion for emergency rule to show cause and for injunction. Counsel for the parties have filed responsive pleadings with respect thereto.

Whereas on July 7, 1972, the Supreme Court of the United States stayed the judgments of this court entered herein July 5, 1972, and

Whereas we think doubts suggested by appellees as to the scope of the stay entered by the Supreme Court should be resolved by interpreting the Court's stay as suspending the operation of the injunction issued by this court July 5, 1972,

The Emergency Motion for a rule to show cause is denied;

And whereas in light of the status of the proceedings in this case we think this court is not an appropriate forum for the initiation of new proceedings for an injunction based on intervening events in the courts of Illinois,

The Emergency Motion for injunction is also denied.

No. 73-1106

FEB 22 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Appellate Court

PETITIONERS' REPLY MEMORANDUM

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The
Illinois Appellate Court

PETITIONERS' REPLY MEMORANDUM

Petitioners submit that the orders of the Circuit Court of Cook County and the judgment of the Illinois Appellate Court, of which review is sought herein, are directly contrary to the controlling decision of this Court, announced at a special session on the evening of Friday, July 7, 1972, that, in the particular circumstances of the case, the 1972 Democratic National Convention (opening in Miami, Florida on Monday, July 10, 1972) had the right to decide the Chicago and California credentials contests. *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972)(set forth in full as Appendix A) (discussed in the Petition for Certiorari at pp. 21-28).

Respondents' brief in opposition to the Petition for Certiorari does not even attempt to reconcile the action

of the Circuit Court of Cook County in issuing its order on the evening of July 8, 1972—purporting to bar petitioners (one of the contesting Chicago delegations) from participating as delegates in the 1972 Democratic National Convention—with the explicit language of this Court's *per curiam* decision of July 7, 1972 (the night before). This Court's opinion cited the "large public interest in allowing the political processes to function free from judicial supervision" (at p. A-5) and emphasized that "it has been understood since our national political parties first came into being as voluntary associations of individuals that the Convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4) Expressly noting that its action "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee" (at p. A-5), this Court stayed the judgments of the Court of Appeals for the District of Columbia so that the 1972 Democratic National Convention "could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee" on the Chicago and California contests (at p. A-3). On the next evening, the Circuit Court of Cook County simply ignored this Court's decision and issued its order purporting to bar petitioners from acting as delegates in the Convention.

Nor do respondents offer any explanation as to how this Court's action on July 7, 1972 in staying (but not at that time vacating) the judgment of the Court of Appeals for the District of Columbia could be construed, contrary to explicit and unambiguous law (see the Petition for Certiorari at pp. 25-26) and contrary to the clear language of this Court's opinion, as somehow permitting respondents to relitigate the issues in the case in an Illinois state court in an effort to obtain a different result. Indeed, respondents' sole reference to this Court's decision of July 7, 1972, ignoring completely this Court's opinion, consists of the statement (at p. 9 of their brief) that "it is not reasonable to conclude" that this Court's stay of the judgment of the Court of Appeals, which judgment had included an injunction against proceedings in the Circuit Court of Cook County, "was in fact intended to enjoin such proceedings in that court." Respondents' argument appears to be that because this Court did not enjoin proceedings in other courts, respondents were free to seek relief in other courts, *notwithstanding the prior decision of this Court.* When this Court decides a case, it does not customarily issue an injunction against the possibility that the unsuccessful litigants will seek to relitigate the issues in a state court and obtain relief contrary to this Court's decision. This Court has held that injunctions to effectuate its decisions are unnecessary because this Court assumes that state authorities will give "full credence" to its decisions. See *Roe* v. *Wade*, ... U.S. ....., ..., 93 S.Ct. 705, 733 (1973).

The principal contention to which respondents devote their brief (at pp. 7-11)—that the Illinois court was properly acting "to protect its electoral process"—is simply a reiteration of the claim which respondents had asserted unsuccessfully in the Washington D.C. Federal courts, and this Court, in their effort to reverse the Credentials Committee's decision on the Chicago contest prior to the 1972 Convention.* Respondents quote the Court of Appeals for

---

* See, *e.g.*, respondents' argument in their Application to this Court on July 6, 1972:

> "There are substantial reasons for the exercise of this Court's discretion to grant a writ of certiorari in the instant case. The Court of Appeals for the District of Columbia has totally ignored the Illinois Election Code and has superimposed upon said Code requirements which disenfranchise the electorate and violate the rights of office-holders. In this context, major issues are presented concerning the rights and relationships

the District of Columbia (at p. 4 of their brief) as stating in the Federal court action that "No violation of Illinois law is at issue here." In fact, the Court of Appeals made that statement in the context of considering, and expressly rejecting, respondents' argument that their election under Illinois law required that they be seated in the National Convention, despite the Rules of the National Democratic Party.* The full quotation from the Court of Appeals decision of July 5, 1972 reads as follows:

> "The challenged delegates claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the challenged delegation. No violation of Illinois law is at issue here. The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent. The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addi-

(Footnote continued)

> among voters, elected officials, and political parties. It is imperative that this case be heard to vindicate the electoral process."

See also respondents' complaint in the Federal court action (quoted at p. 7 of the Petition for Certiorari).

* Respondents apparently seek to imply some distinction between the Washington, D.C. suit and the instant state court proceedings by noting (at p. 4 of their brief) that the Federal court action was instituted by "a delegate other than Wigoda" (the named plaintiff herein). Both actions were brought as class actions on behalf of all of respondents. Wigoda and Keane (the named plaintiff in the Washington, D.C. Federal court action) share law offices and have been represented in both actions by the same attorney.

> tion to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself." (at pp. D-16-D-17)

Subsequently, this Court in its decision of July 7, 1972 upheld the right of the 1972 Democratic National Convention, in the particular circumstances of the case, to decide the Chicago and California contests and to determine whether to seat the delegates elected under Illinois and California law, or the contesting delegations, or possibly some combination of the two.

Respondents' suggestion (at pp. 11-12 of their brief) that petitioners' constitutional rights of free political association were not abrogated by the order of the Circuit Court of Cook County because petitioners were merely barred from participating in the Convention as delegates, and not "from acting in the Convention in some other capacity," is patently frivolous. It was as delegates from the Chicago districts—to rectify respondents' "covert, calculated and deliberate" violations of the National Party Rules (see the Report of the Hearing Examiner included as Appendix D)—that the Credentials Committee, and subsequently the entire Democratic National Convention, determined that petitioners should participate. Rejecting respondents' argument that they should be seated notwithstanding their deliberate violations of National Party Rules, the Credentials Committee and the Convention decided that petitioners, and not respondents, were the delegates who should represent the Chicago districts.*

* Respondents continue to assert various factual and other matters which bear upon the merits of the Democratic Party's decision on the Chicago contest (see, *e.g.*, pp. 7-8, 12 of their brief). Since the wisdom of the Democratic Party's decision is extraneous to the legal issues in the case, petitioners have not sought to respond to these

As a final reason why this Court should now deny relief, respondents offer (at pp. 15-17 of their brief) the new contention, not advanced in the court below and in no way supported by the judgment below, that the case "presents moot and abstract questions." Petitioners submit that the case is neither moot nor abstract for the following reasons (set forth more fully in the Petition for Certiorari):

1. Petitioners are threatened with fines or jail sentences for participation in the 1972 Democratic National Convention in alleged violation of the initial order of the Circuit Court of Cook County appealed from herein.

For more than a year since the 1972 Democratic National Convention, respondents, publicly and in court, have pursued petitioners for alleged contempt of the July 8, 1972 order of the Circuit Court of Cook County ap-

(Footnote continued)
arguments. As a general matter, petitioners would note the judgment of one disinterested observer:

> ". . . Though duly elected in district primaries, these delegates [respondents] had been slated, which is to say, selected as nominees with party endorsement, by procedures that were effectively proof against insurgency, or against participation by outsiders, as insurgency is now called. . . . Their [respondents'] chief argument was that election cures all. It is, in their view, a kind of absolution. But the delegate-selection requirements, unlike some more demanding precept systems, do not provide for absolution, by election or otherwise. They are, by contrast, rather like law that way.
>
> ". . . [T]he [Democratic] party will in the long run be strengthened by the decision in the Daley case, as any institution is strenghtened which visibly and painfully submits itself to the process of law, and obeys the rules it has made for its own governance." A. Bickel, "Will the Democrats Survive Miami?" 167 *New Republic* 17, 18 (July 15, 1972).

pealed from herein. The trial judge, after issuing rules to show cause against 62 of petitioners, has deferred criminal contempt trials (which the judge has stated may be lengthy and in which petitioners are threatened with fines or jail sentences), conditioned upon rapid prosecution by petitioners of this appeal. Thus petitioners clearly have a "substantial stake" in the validity of the order appealed from and petitioners are threatened with severe "disabilities or burdens" if the judgment below is not reversed. *Cf. Carafas* v. *LaVallee*, 391 U.S. 234, 237-38 (1968); *Ginsberg* v. *New York*, 390 U.S. 629, 633 (1968).

As noted, the trial judge has deferred the contempt trials pending disposition of this appeal. There is no basis for respondents' suggestion (at p. 16 of their brief) that the trial judge might go forward with contempt proceedings even if his orders are reversed by this Court. There is no logic or precedent to support the suggestion that petitioners might be punished for disobeying an invalid order under circumstances where the effect of the order, if obeyed, would have been irrevocably to deprive the National Democratic Party of its right to decide the Chicago contest and irrevocably to deny petitioners their right to participate in the Convention (opening on July 10, 1972) in accordance with the Convention's decision. Further, this Court (as well as the Court of Appeals for the District of Columbia) had expressly decided the issue in the case in the Federal court action instituted by respondents. The subsequent contrary order of the Circuit Court of Cook County was, as counsel for the Democratic National Committee has stated, "transparently invalid" in light of those prior decisions (see the Petition for Certiorari at pp. 26-27). For these reasons alone, therefore, cases such as *Walker* v. *City of Birmingham*, 388 U.S. 307 (cited by respondents at p. 16 of their brief), which indicate that under some circumstances an unconstitutional order of a

state court must nevertheless be obeyed, have no applicability.[8]

2. The supplemental order of the Circuit Court of Cook County appealed from herein continues to bar petitioners from participating in the selection of Democratic National Committee members from Illinois.

In suggesting that the case now presents "moot and abstract questions" (at pp. 15-17 of their brief), respondents ignore completely the Circuit Court's supplemental order of August 2, 1972 which bars petitioners from participating in the selection of members of the Democratic National Committee to serve until 1976, despite the fact that the rules of the National Democratic Party provide that the delegates seated at the 1972 Convention are entitled to choose the National Committee members. The persons chosen by the August 5, 1972 caucus in which respondents participated (as a result of the Circuit Court's supplemental order) have served in the National Committee during the interim period, pending prosecution (at such time as the Circuit Court's order should be vacated) of the challenge filed by petitioners with the Democratic

[8] Respondents apparently seek to imply some criticism of petitioners for not filing their appeal from the Circuit Court's initial order until "twenty-six days after the Circuit Court acted" (p. 5 of their brief). When the Circuit Court order was issued on the evening of July 8, 1972, petitioners, who were then in Miami, Florida for the National Convention, immediately announced publicly their intention to appeal. Following the Convention, it was hoped by petitioners, and widely believed, that respondents would not seek to pursue further proceedings under the July 8 order of the Circuit Court of Cook County. When respondents instituted the contempt proceedings and obtained the supplemental order of August 2, petitioners immediately filed their appeal. Emergency relief was denied at that time, and the Illinois Appellate Court subsequently upheld both the July 8 and the August 5 orders in the judgment appealed from herein.

National Committee (see the Petition for Certiorari at p. 15). In pleadings filed in the Court of Appeals for the District of Columbia, respondents themselves stated that this case is not moot:

> "The case on appeal in Illinois appears to present a 'live' controversy in view of the supplemental injunction which pertains to present representation of Illinois in the Democratic National Committee." Suggestion of Keane, et al. that the Instant Cause Be Dismissed in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. January 23, 1973 at p. 4).[8]

3. The judgment below raises fundamental constitutional questions which are of critical, continuing importance to the functioning of American political parties.

The holding of the Illinois Appellate Court is that a national political party convention is "without power or authority" to deny seats to persons chosen as delegates in accordance with state law (at p. B-32) and that persons so chosen have "a legal right [to be seated] properly protected by the courts", (at p. B-26) notwithstanding contrary rules and decisions of the national political party. As set forth in the Petition for Certiorari (at pp. 28-32), it is difficult to exaggerate the significance of that decision, if valid,

[8] Respondents' brief wholly ignores the decision of the Court of Appeals on February 16, 1973, on remand from this Court, after being fully advised of all of the proceedings in this case, that "the 1972 Convention of the National Democratic Party, acting within its competence, seated [Petitioners] at the Convention" (see Appendix E). Respondents' effort to derive support for their position from the Court of Appeals' denial of injunctive relief against the Illinois proceedings (see pp. 4, 9 of their brief) is contradicted by the foregoing holding on the merits and by the Court of Appeals' express statement that it denied injunctive relief because of the absence of "extraordinary circumstances" justifying Federal intervention in a pending state proceeding (see the Petition for Certiorari at p. 11).

for the functioning of American political parties and their national presidential nominating conventions. It raises a recurring question of fundamental importance which would warrant review by this Court even if the judgment below did not have the continuing, critical consequences for petitioners discussed above. Cf. *Dunn* v. *Blumstein*, 405 U.S. 330, 333 (1972).

There is no merit in respondents' suggestion (at p. 15 of their brief) that the case involves an "*ad hoc* situation" which may not be of continuing significance. In 1972 alone, for example, if the judgment below were correct, the Democratic National Convention would have been without power to decide both the California and Chicago credentials contests and could only have seated the delegates chosen under Illinois and California law—very possibly affecting the outcome of the Convention. Repeated similar contests could be cited (*e.g.*, the Georgia contest at the 1952 Republican Convention, the Alabama, Georgia and Mississippi contests at the 1968 Democratic Convention) in which the national conventions of both political parties have refused to seat delegates chosen under state law and have seated contesting delegations (see the Petition for Certiorari at pp. 30-31).[4] As this Court emphasized in *Keane* v. *National Democratic Party*, "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions" (at p. A-5).

The issue goes beyond any specific rules or principles of either national political party and is not eliminated by any possible revisions thereof. If the Illinois decision is

[4] Frequently the national conventions have compromised such contests by seating all or portions of both delegations (see R. Bain, *Convention Decisions and Voting Records* (Brookings 1960)), as was considered by the 1972 Democratic National Convention prior to its final vote on the Chicago contest.

not reversed by this Court, it is a virtual certainty that in every future credentials contest there will be resort to the state courts for relief. Further, the continuing rule-making processes of both national political parties are, under the decision of the Illinois court, rendered largely moot and irrelevant. The question raised by the judgment below is the fundamental one of whether a national political party can be denied the power to enforce its own standards, rules and principles or—if the Illinois courts are correct—is bound to seat delegates chosen under state law, with future credentials contests to be decided not by the national conventions themselves but by the courts. Petitioners submit that the need for review by this Court of the unprecedented decision of the Illinois courts on these fundamental constitutional issues is clear.

In view of the fact that this Court has already once decided the issues presented in the instant case, and the Illinois courts have refused to follow this Court's decision, petitioners respectfully pray that, in these circumstances, this Court issue its writ of certiorari to the Illinois Appellate Court and summarily reverse the judgment of the Illinois Appellate Court on the authority of *Keane* v. *National Democratic Party*. In the alternative, petitioners request this Court to grant the writ and review the substantial Federal questions raised herein.

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FILED
JUN 12 1974
MICHAEL RODAK, JR., CLERK

No. 73-1106

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court

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I. The Injunction Orders Issued By the Circuit Court of Cook County, and Affirmed by the Illinois Appellate Court, Against Participation by Petitioners as Delegates to the 1972 Democratic National Convention Were Barred by the Decisions of this Court and the Court of Appeals for the District of Columbia in *Keane* v. *National Democratic Party* 23

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSINS, ET AL.,
Petitioners,

vs.

PAUL T. WIGODA, ET AL.,
Respondents.

On Writ Of Certiorari To The Illinois Appellate Court

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported at 14 Ill. App.3rd 460, 302 N.E.2d 614 (1973), and is reproduced in the Appendix at A.-121.* The unreported in-

* The "A. ...." references are to the Appendix filed with this brief.

junction orders of the Circuit Court of Cook County, Chancery Division, affirmed by the Illinois Appellate Court, are reproduced at A.-84, A.-115.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on September 12, 1973. On November 29, 1973, the Supreme Court of Illinois denied, without opinion, petitioners' timely motion for leave to appeal to that court the judgment of the Illinois Appellate Court. A Petition for Certiorari to the Illinois Appellate Court was filed in this Court on January 14, 1974, asserting jurisdiction in this Court to review the judgment of the Illinois Appellate Court pursuant to 28 U.S.C. § 1257(3). This Court granted the Petition on March 4, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article VI, Section 2 (the Supremacy Clause) and the First and Fourteenth Amendments.

QUESTIONS PRESENTED

1. Whether the injunction orders issued by the Circuit Court of Cook County, and affirmed by the Illinois Appellate Court, against participation by petitioners as delegates to the 1972 Democratic National Convention were barred by the decisions of this Court and the Court of Appeals for the District of Columbia in *Keane* v. *National Democratic Party*.

2. Whether, as the Illinois Appellate Court held, state law exclusively governs the selection and seating of delegates to a National Political Party Convention, and participation in other National Party affairs, notwithstanding applicable rules and decisions of the duly authorized authorities of the National Political Party.

3. Whether an injunction against the participation in a National Political Party Convention, and in other National Party affairs, of persons seated in said Convention by its Credentials Committee, and by vote of the delegates to the Convention, violates the rights of free political association of said persons and said National Political Party and its members as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

4. Whether petitioners' right to a fair hearing as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution was denied in view of the public statements concerning this case made by the trial judge while the instant case was pending before the said trial judge, which statements demonstrated a gross bias and prejudice against petitioners.

STATEMENT OF THE CASE

Preliminary Statement

This case arises out of the contest between petitioners and respondents over which competing delegation should be seated to represent the Chicago districts at the 1972 Democratic National Convention which opened in Miami, Florida on Monday, July 10, 1972. This credentials contest was the subject of this Court's decision in *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972) (considered together with the case involving the California credentials

contest and decided *sub nom. O'Brien* v. *Brown*), announced at a Special Term on the evening of Friday, July 7, 1972. That action was instituted by respondents in an effort to reverse the decision of the Democratic Party's Credentials Committee in favor of seating petitioners as the Chicago delegates.

This Court determined to stay the judgments of the United States Court of Appeals for the District of Columbia in both the Chicago and California cases stating that: "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4. This Court noted that its action "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee" (*id.* at 5), but this Court emphasized "the large public interest in allowing the political processes to function free from judicial supervision." *Id.*

Petitioners submit that the July 7 decision of this Court established that, in the particular circumstances of this case, the Democratic National Convention—and not the courts—was to decide the Chicago credentials contest. Nothing in this Court's *per curiam* opinion suggested that it intended its stay order to permit relitigation of the issues adjudicated by the Court of Appeals in another judicial forum. On the contrary, this Court expressly stated that it acted to preserve the right of the National Convention "to accept or reject, or accept with modification, the proposals of its Credentials Committee." *Id.* at 3.

Nevertheless, this contest now comes before this Court again because, notwithstanding the July 7 decision of this

Court, on the next evening, Saturday, July 8, 1972, respondents (the unseated Chicago delegates who had themselves instituted the action which resulted in this Court's decision) sought and obtained from the Circuit Court of Cook County an injunction purporting to bar petitioners from participating in the Democratic National Convention which opened on Monday, July 10, 1972. Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, commenced contempt proceedings in which petitioners are threatened with jail sentences for participation in the Democratic National Convention in alleged violation of the Circuit Court's injunction. In addition, on August 2, 1972, the Circuit Court of Cook County issued a supplemental order enjoining petitioners from participating in the selection of members of the Democratic National Committee from Illinois. (A.-115.) The orders of the Circuit Court of Cook County were upheld on appeal by the Illinois Appellate Court (First District).

The Contest Over the Chicago Seats at the 1972 Democratic National Convention

The challenge against the seating of respondents as the Chicago delegates to the 1972 Democratic National Convention was filed with the Acting Chairman of the Democratic Party's Credentials Committee on March 31, 1972. The challenge did not contest the fact that respondents had been elected at the Illinois primary in accordance with Illinois law, but rather alleged deliberate violation by respondents of National Party Rules relating to preprimary activities and other matters not covered by the Illinois law. Among other things, the challenge alleged that respon-

dents had engaged in closed and secret slatemaking in violation of National Party Rule C-6; that slatemaking and other affairs of the Chicago Democratic Party were conducted without published rules in violation of Rule A-4; and that in slatemaking and other party processes respondents discriminated against racial minorities, women and young people in violation of Rules A-1 and A-2. The National Party Rules were set out in the Official Call of the 1972 Democratic National Convention and are included in the Hearing Examiner's Report (A.-20.).

Under the National Democratic Party Rules, the Acting Chairman of the Credentials Committee appointed a Hearing Examiner to hear evidence on the challenge and determine whether National Party Rules had been violated. Cecil F. Poole, former United States Attorney for the Northern District of California, was appointed Hearing Examiner on the Chicago challenge.* Examiner Poole held hearings in Chicago on May 31, June 1 and June 8, 1972. Both petitioners and respondents were represented by counsel and oral and documentary evidence was received. The proceedings were reported by certified court reporters resulting in a transcript approximating 2,000 pages. More than 500 exhibits, including affidavits and other documents, were introduced. (A.-20.)

* Initially Mr. Louis F. Oberdorfer, a member of the bar of the District of Columbia, was appointed Hearing Examiner; however, Mr. Oberdorfer declined to serve after allegations were made by respondents at a pre-hearing conference that he had a conflict of interest with respect to the contest.

On June 25, 1972 the Examiner issued his Report finding that respondents had engaged in deliberate violations of National Party Rules set forth in the Convention Call. Among other things, the Examiner found that respondents had discriminated against racial minorities, women and young people "invidiously and substantially" (A.-38.) and that "the Party [in Chicago] has failed in its basic obligation to open up to fuller participation by those who have been excluded" (A.-23.). The Examiner expressly rejected any interpretation of the National Party Rules as involving a "quota" system, stating that "any such principle would be encumbered by grave doubt in any case." (A.-23.)

The Examiner further found:

> ". . . [T]he challenged slate of delegates [respondents] was selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago . . . to the exclusion of other candidates not favored by the organization and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate." (A.-21.)

> "[T]here was a clear concert of act and deed among officials of the regular party organization in Chicago . . . to accomplish the private selection of delegates, thereafter to put the full weight, authority, prestige and support of the organization behind the candidacies of those thus chosen, and to discourage and render ineffective efforts by those outside the penumbra of the party influence." (A.-22.)

> "[T]he violations of [the Rules] were deliberate, covert and calculated." (A.-22.)

On June 19, 1972, the Credentials Committee of the 1972 Democratic National Convention (consisting of 150 members representing the various state delegations) opened hearings in Washington, D.C. The Committee ultimately heard challenges to delegates from 26 states, of which the Chicago and California contests were the most highly publicized and intensely contested. The Committee heard argument from counsel for both petitioners and respondents on Friday, June 30, 1972 and, after debate, voted to sustain the Examiner's Report and to seat petitioners as the delegates from the Chicago districts in light of respondents' "deliberate, covert and calculated" violations of National Party Rules.*

A minority Credentials Committee report supporting respondents was filed. Thus the contest was ultimately decided on the floor of the National Convention itself. Petitioners and respondents debated the contest at caucuses of the various state delegations and the contest was the subject of intense public debate and political struggle during this period. At the opening session of the National Convention on Monday, July 10, 1972, after speeches and argument from both petitioners and respondents and their respective supporters, a motion was made to suspend the rules and seat both contesting delegations, splitting the votes; but that motion failed. The delegates to the Convention then voted to sustain the majority report of the

* As the Illinois Appellate Court notes (A.-127), petitioners consisted largely of the defeated candidates in the Illinois primary—i.e., those who had run for delegate and (unlike respondents) had not been found to have violated the National Party Rules. The number of such candidates was greater than the number of delegates in each district so caucuses were held in each district at which the defeated candidates selected the new delegates. (A.-80.)

Credentials Committee seating petitioners as the Chicago delegates.*

Respondents' Federal Court Action and This Court's Decision of July 7, 1972

On Monday, July 3, 1972, following the decision of the Credentials Committee, respondents petitioned the Federal District Court for the District of Columbia to reverse the Credentials Committee's decision and to order the National Democratic Party and the National Convention to seat respondents, and not petitioners, as the Chicago delegates. Respondents' complaint (originally filed May 19, 1972) requested of the Federal court among other things:

> "That this Court declare, adjudge and decree that Plaintiff and the Delegates [respondents] have been duly elected in accordance with the provisions of the Illinois Election Code, and that they are, therefore, entitled to take their seats as delegates and alternates to the 1972 Democratic National Convention and to function and participate fully therein without interference by or on behalf of Defendants." Complaint of Thomas E. Keane, et al. for Declaratory and Injunctive Relief, Civ. No. 1010-72 (D.C. Dist. Ct.) at p. 13.

* For views of the importance of the Democratic Party's final decision on the Chicago contest, see, e.g., Bickel, "Will the Democrats Survive Miami?" 167 *New Republic* at 18 (July 15, 1972) "[T]he [Democratic] Party will in the long run be strengthened by the decision in the Daley case, as any institution is strengthened which visibly and painfully submits itself to the process of law, and obeys the rules it has made for its own government"); Broder, "The Democrats' Dilemma," *The Atlantic Monthly* (March, 1974) at 31 (describing the critical reaction of many party "regulars" to the decision on the Chicago contest which Broder describes as the "central, defining scene" of the 1972 Democratic National Convention).

The District Court dismissed respondents' complaint on July 3, 1972. The District Court's dismissal was unanimously affirmed by the Court of Appeals for the District of Columbia Circuit on Wednesday, July 5, 1972. *Keane* v. *National Democratic Party*, 469 F.2d 563 (D.C. Cir. 1972). The Court of Appeals noted that "in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law." (A.-57.) The Court of Appeals further stated that:

> "The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself." (A.-54.)

Advised by counsel for petitioners at oral argument that even if respondents were unsuccessful in their Federal court action, respondents would seek to proceed in an Illinois state court to enjoin petitioners from participating in the National Convention on the ground that only the delegates elected under Illinois law could be seated, the Court of Appeals, having expressly rejected that claim, enjoined respondents "from taking action in any other court that would impair the effectiveness and integrity of the judgments of this Court." (A.-61.)

At the same time, in a companion case instituted by the delegates elected under California law who had been denied a portion of their Convention seats by the Credentials Committee, the Court of Appeals reversed the decision of the Credentials Committee on the ground that the Credentials Committee's decision on the California challenge was not made in accordance with applicable National Party Rules and violated the due process clause of the Fourteenth Amendment. (A.-41-51.) The National Democratic Party (seeking to uphold the 1972 National Convention's right to freely decide the contests) and respondents then sought relief from this Court.

On the evening of Friday, July 7, 1972, at a Special Term, this Court stayed the judgments of the Court of Appeals in both cases, stating that it did so in order to permit the decisions on both the Illinois and California contests to be made by the 1972 Convention. This Court's *per curiam* opinion noted that:

> "The particular actions of the Credentials Committee on which the Court of Appeals ruled are recommendations that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee." 409 U.S. at 3.

This Court cited "the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates" *Id.* at 4. This Court emphasized the historical right of the National Party Conventions to decide credentials contests:

> "Judicial intervention in this area traditionally has been approached with great caution and restraint. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (CA8 1968), affirming 287 F. Supp. 794 (Minn. 1968), and cases cited; *Lynch* v. *Torquato*, 343 F.2d 370 (CA 3 1965); *Smith* v. *State*

Exec. Comm. of Dem. Party of Ga., 288 F.Supp. 371 (ND Ga. 1968). Cf. *Ray* v. *Blair*, 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.

This Court concluded:

> "In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed." 409 U.S. at 5.

This Court's stay order had the effect of preventing enforcement of the California decision of the Court of Appeals against the 1972 Convention (enforcement of which would, as this Court noted, have "denie[d] to the Democratic National Convention its traditional power to pass on the credentials of the California delegates"). But this Court did not at that time reverse or vacate, but merely stayed, the judgments of the Court of Appeals. Nothing in this Court's opinion suggested that it intended its stay order to permit relitigation of the issues adjudicated by the Court of Appeals in another judicial forum. On the contrary, this Court expressly stated that it was acting to permit the political process of the Convention to function free from judicial supervision. This Court stated:

> "We recognize that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." 409 U.S. at 5.

The Court of Appeals' Decision of February 16, 1973

Subsequent to the Convention, on October 10, 1972, this Court (on motion of the National Democratic Party) vacated the judgment of the Court of Appeals for the District of Columbia in *Keane* v. *National Democratic Party* and remanded the case to the Court of Appeals for the District of Columbia for a determination as to whether it had become moot. *Keane* v. *National Democratic Party*, 409 U.S. 816 (1972).

On February 16, 1973, the Court of Appeals held, 475 F.2d 1287, that the case was moot insofar as it involved respondents' complaint against the seating of petitioners in the National Convention, stating:

> "In the period intervening since the action of the District Court [July 3, 1972] the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs Keane, et al. [respondents] in the District Court." (*Id.* at 1288)

Thus, the Court of Appeals stated that, under the July 7 decision of this Court, the 1972 National Convention had the right to decide the Chicago credentials contest and to seat petitioners as the Chicago delegation. The Court of Appeals expressly reaffirmed the District Court's previous dismissal of respondents' complaint. (*Id.* at 1288)*

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* On February 22, 1973, respondents moved to have the Court of Appeals revise its opinion and vacate the judgment of the District Court arguing that "the Court erred in affirming the judgment of the District Court." The Court of Appeals denied respondents' motion.

No review was sought by respondents of the Court of Appeals' February 16 judgment.

The Court of Appeals was asked by petitioners to enjoin any further proceedings by respondents against petitioners in the Illinois courts. However, the Court of Appeals declined to do so stating it was of the opinion that "no exceptional circumstances appear to justify now the relief requested." (*Id.* at 1288)*

Respondents' State Court Action and the Injunctive Orders Appealed From Herein

Respondents instituted the state court action which is the subject of the instant case on April 19, 1972, requesting the Circuit Court of Cook County to enjoin prosecution of the challenge by petitioners on the ground that respondents, and no other persons, could lawfully participate in the National Convention as delegates from the Chicago districts. (A.-1.) On April 20, 1972, petitioners filed a petition for removal of the action to the Federal District Court for the Northern District of Illinois on the ground that respondents' assertion of the supremacy of state law in the selection of National Convention delegates was properly characterized as a claim under Federal law. On May 17, 1972, the Federal District Court issued an opinion holding that the Federal constitutional issues arose only in defense and therefore did not support removal. *Wigoda* v. *Cousins*, 342 F. Supp. 82 (N.D. Ill.), *aff'd per curiam*, No. 72-1384 (7th Cir. 1972). In his opinion on the remand question, District Judge Hubert L. Will noted:

* It may be noted that the National Democratic Party urged the Court of Appeals that direct appeal through the Illinois courts, rather than a collateral Federal injunction, provided petitioners an appropriate avenue of relief from the Illinois injunction orders. See also *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (Mr. Justice Rehnquist, in Chambers).

> "This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. *The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party or the convention.*" (Emphasis added.) (A.-12.)

Despite the remand of the case, action in the state court was delayed as a result of intervening Federal proceedings, including a Federal injunctive action instituted by petitioners in the District Court for the Northern District of Illinois under 42 U.S.C. § 1983,* and thus none of the

* On May 25, 1972, Federal District Judge Frank J. McGarr granted a temporary restraining order (and subsequently a preliminary injunction) against prosecution by respondents of their state court action for an injunction against petitioners' participation in the political process of the National Democratic Party. *Cousins* v. *Wigoda*, Civil No. 72 C 1108 (N.D. Ill. May 25, 1972, June 9, 1972). On June 29, 1972 the Court of Appeals for the Seventh Circuit (in a 2-to-1 decision) vacated the District Court's injunction, citing principles of Federal-state comity. *Cousins* v. *Wigoda*, 463 F.2d 602 (7th Cir. 1972). On July 1, 1972, Mr. Justice Rehnquist denied a petition for a stay of the order of the Seventh Circuit. *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972).

Immediately following the decision of the Seventh Circuit on June 29, 1972, the Circuit Court of Cook County did issue an *ex parte* temporary restraining order which purported to bar the submission of names of an alternative delegation to the Credentials Committee; however, that order subsequently expired by its terms and was not the subject of any further proceedings. On Wednesday, July 5, 1972, advised of the decision of the Court of Appeals for the District of Columbia Circuit that morning (see p. 10, *supra*), the Circuit Court of Cook County indefinitely stayed further proceedings in the state court action and there were no further proceedings in the state court until July 8, 1972, after this Court's decision of July 7, 1972.

actions of the Illinois state court which are the subject of the instant case occurred until after this Court's decision of July 7, 1972 in the Washington, D.C. Federal court proceeding instituted by respondents in an effort to reverse the decision of the Credentials Committee.

On Saturday, July 8, 1972, following the decision of this Court on July 7, 1972, respondents sought and obtained from the Circuit Court of Cook County the injunctive order purporting to bar petitioners from participating in the 1972 Convention. (A.-84.) The July 7 decision of this Court and the July 5 decision of the Court of Appeals were presented to the trial judge, and attorneys for petitioners argued that those decisions were controlling as to the issues in the case and barred judicial interference with the processes of the 1972 Democratic National Convention. (Transcript of Proceedings, July 8, 1972 at 25-30, 32 *et seq.* and related Exhibits.) Petitioners further argued that any injunction would violate constitutional rights of petitioners and the National Democratic Party. (*Id.* at 54 *et seq.*) The trial judge stated that he had read the opinion of this Court (*Id.* at 81-82), but nevertheless on the evening of Saturday, July 8, 1972 issued the initial injunction appealed from herein.

Post-Convention Actions of the Circuit Court of Cook County

Under the Rules of the National Democratic Party adopted at the 1972 Convention, the delegates seated at the Convention were entitled to choose the new Illinois members of the Democratic National Committee to serve until the 1976 National Convention. A caucus of the Illinois delegation was scheduled to be held in Chicago for this purpose on August 5, 1972, several weeks after the Convention. On August 2, 1972, the Circuit Court of Cook

County, as supplemental relief in this action, issued an order, also the subject of review herein, barring petitioners from participating in that caucus, although petitioners had been seated as the Chicago delegates by the 1972 Convention.* (A.-115.) As a result of the Circuit Court's order, respondents, and not petitioners, participated in the August 5 caucus. Petitioners immediately filed with the Democratic National Committee notice of intent to challenge the results of the August 5 caucus under National Party Rules and to call a new caucus to choose members of the Democratic National Committee in accordance with the Rules at such time as the order barring petitioners from exercising their rights as delegates granted by the 1972 Convention should be vacated on appeal.

Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, has caused to be served on 62 of the petitioners rules to show cause why they should not be held in contempt for participation in the Democratic National Convention in violation of the July 8, 1972 injunction of the Circuit Court of Cook County. Criminal trials for contempt have been deferred by the Circuit Court of Cook County conditioned on rapid prosecution by petitioners of these proceedings. In re-

* At that time petitioners and the National Democratic Party sought emergency injunctive relief against the Illinois state court proceedings from the Court of Appeals for the District of Columbia Circuit; however, that court declined to intervene stating that it was "not an appropriate forum" for such proceedings. *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. August 3, 1972). Petitioners also unsuccessfully sought emergency relief from the Supreme Court of Illinois.

sponse to motions by petitioners, the trial judge has stated that jail sentences imposed will not exceed six months and that, therefore, petitioners have no right to trial by jury.

Public Statements by the Trial Court Judge

Subsequent to the issuance of the July 8, 1972 order and while the 1972 Convention was in progress, various newspapers reported *ex parte* interviews with the trial court judge, Daniel A. Covelli, with respect to the Chicago challenge. His statements display the judge's bias against petitioners in this case. Judge Covelli was quoted as advising respondents to seek to have his order enforced through proceedings in the Florida state courts as follows:

> "If I were Daley's lawyers I would file contempt papers down in Dade County (Florida) because that state should honor and enforce the orders of any other state." (*Chicago Daily News,* July 11, 1972 at p. 6) (Defendants' Motion to Vacate, Motion for Judge to Recuse Himself and Motion for Change of Venue, filed July 20, 1972, Exhibit B.)

Judge Covelli was further quoted in reference to the contest comparing the situation to that of Nazi Germany:

> "I'll tell you this: If McGovern is elected it's going to be another Nazi Germany. Remember when Hitler took over and all the young guys were behind him . . . and you know what he did to Germany." (*Chicago Daily News,* July 11, 1972 at p. 6) (*Id.*)

Judge Covelli has conceded that he discussed the case with newspaper reporters outside the presence of the parties. (Transcript of Proceedings, July 20, 1972 at pp. 24-26.)

Subsequent to the Convention, petitioners moved that Judge Covelli vacate his July 8 order and disqualify himself from any further proceedings in the case on the ground that his statements indicated a patent bias, preventing petitioners from obtaining a fair hearing and a fair trial. Judge Covelli denied the motion and has continued to act in the case, issuing the supplemental order of August 2, 1972 and instituting criminal contempt proceedings against petitioners for alleged violation of the order of July 8, 1972.

The Decision of the Illinois Appellate Court

On September 12, 1973, the Illinois Appellate Court (First District) upheld the July 8 and August 2 orders of the Circuit Court of Cook County. In rejecting petitioners' contentions, the Appellate Court asserted that "the law of the state is supreme and party rules to the contrary are of no effect" (A.-143.) and held that:

> "The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois election code." (A.-139.)

The Appellate Court further stated:

> "Once the delegates were chosen in a free, open and non-discriminatory primary election, it became the legal duty of the party to carry out the mandate of the electorate. Once elected, any question of the delegates' qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts." (A.-144.)

The Appellate Court concluded:

> "We think the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats in the Convention and most cer-

tainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate. Such action is an absolute destruction of the democratic process of this nation and cannot be tolerated." (A.-149.)

As noted earlier, on November 29, 1973, the Supreme Court of Illinois denied petitioners' motion for leave to appeal the decision of the Illinois Appellate Court.

SUMMARY OF ARGUMENT

I. The July 7, 1972 decision of this Court established the right, in the particular circumstances of this case, of the 1972 Democratic National Convention to decide the Chicago credentials contest. This Court's *per curiam* opinion, citing "the large public interest in allowing the political processes to function free from judicial supervision" (409 U.S. at 5), was explicit in this respect. Once this Court had spoken in the matter, the Circuit Court of Cook County had no power to issue any injunctive orders contrary to this Court's decision.

Even if the explicit language of this Court's opinion of July 7 were ignored, this Court's action in staying, but not at that time vacating, the July 5 judgment of the Court of Appeals for the District of Columbia—which judgment had sustained the decision of the Credentials Committee of the National Democratic Party to seat petitioners as the delegates from Chicago—did not alter the binding collateral estoppel and *res judicata* effect of that judgment so as to permit respondents to attack that judgment collaterally in the Illinois state courts. Nothing in the *per curiam* opinion of this Court

staying the judgments of the Court of Appeals suggested or intimated any intention to permit relitigation of the issues decided by the Court of Appeals in an Illinois court. To the contrary, this Court's opinion expressly stated that its action was intended to permit the Democratic National Convention to exercise the historical right of National Political Conventions to resolve controversies over the seating of their delegates. 409 U.S. at 5.

II. The judgment of the Illinois Appellate Court, upholding the injunction orders of the Circuit Court of Cook County on the grounds that the 1972 Democratic National Convention "was without power or authority" to deny respondents seats in the Convention, and that power to bar the seating of petitioners in the Convention was in fact vested in the Circuit Court of Cook County, represents an unprecedented assertion of judicial power and state law over the political processes of a National Party Convention. No court has ever before purported to enjoin persons from participating as delegates in a National Political Party Convention in accordance with that Convention's decision. Such an injunction is directly contrary to the rights of free political association of persons from throughout the nation who choose to associate together as members of a National Political Party.

If the Illinois Appellate Court is correct, then the courts of each of the fifty states have power to review the decisions of National Political Parties and to determine who should or should not be allowed to participate in National Party Conventions. Further, if the Illinois Appellate Court is correct that state law exclusively governs the right to participate in a National Nominating Convention, then any right of the National Parties to establish and enforce national rules, standards and principles—a

right which both National Political Parties have maintained and exercised for almost a century and a half—is abrogated. Such a holding is contrary to all historical and judicial precedent and is incompatible with the basic constitutional rights of citizens to engage in National Political Party activities.

III. During the course of the proceedings in the trial court, subsequent to the first injunction order involved, but prior to the issuance of the second order, the trial judge publicly advised respondents to enforce his initial injunction order in a Florida state court and compared the Chicago credentials contest to the situation which had developed in Nazi Germany. Petitioners were therefore denied the basic constitutional guarantee of a trial before an impartial and unbiased judge.

IV. This case does not present "moot or abstract" questions because (1) petitioners are threatened with jail sentences for alleged violation of the initial order of the Circuit Court of Cook County subject to review herein, (2) the supplemental order of the Circuit Court of Cook County (also subject to review herein) continues to bar petitioners from participating in the selection of Democratic National Committee members from Illinois to serve until 1976 and (3) the case raises recurring questions of continuing critical importance for the functioning of the American political party system.

ARGUMENT

I.

THE INJUNCTION ORDERS ISSUED BY THE CIRCUIT COURT OF COOK COUNTY, AND AFFIRMED BY THE ILLINOIS APPELLATE COURT, AGAINST PARTICIPATION BY PETITIONERS AS DELEGATES TO THE 1972 DEMOCRATIC NATIONAL CONVENTION WERE BARRED BY THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN KEANE v. NATIONAL DEMOCRATIC PARTY.

A. This Court's Action in Keane v. National Democratic Party, 409 U.S. 1 (1972), Established the Right of the 1972 Democratic National Convention to Decide the Chicago Credentials Contest.

The July 7, 1972 decision of this Court established the right of the 1972 Democratic National Convention—and not the courts—to decide both the Chicago and California credentials contests. This Court's *per curiam* opinion, citing "the large public interest in allowing the political processes to function free from judicial supervision," (409 U.S. at 5) was explicit in this regard. Having chosen to seek to reverse the Credentials Committee's decision on the Chicago contest by legal action in the Federal courts in Washington, D.C., and having lost in the District Court, the Court of Appeals and finally, at a rare Special Term, in the Supreme Court of the United States, respondents clearly were not entitled to relitigate the issues in an Illinois state court in an effort to obtain a dif-

ferent result. Once this Court had issued its order permitting the Chicago contest to be decided by the Democratic National Convention, the Circuit Court of Cook County had no power to issue an injunctive order contrary to this Court's decision.

The opinion of the Illinois Appellate Court upholding the Circuit Court of Cook County offers no basis for the Circuit Court's actions in the face of this Court's July 7 decision. Indeed, the sole discussion in the Illinois Appellate Court opinion of the explicit language of this Court's *per curiam* decision of July 7 consists of the following:

> "[T]he defendants contend the judgment of the Supreme Court staying the injunction of the Court of Appeals was intended solely to permit a determination of the issues to be made by the Democratic National Convention 'free from judicial intervention.' (*Keane* v. *The National Democratic Party*, (1972) 469 F.2d 563, *judgment stayed*, — U.S. —, 34 L.Ed. 2d 1.) The opinion does not say 'free from judicial intervention,' but says 'absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee.'[*] The court was discussing the Federal Courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State courts over their delegates. It must be recognized that the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the Illinois delegates and challengers under the Illinois Election Code." (A.-131-132.)

* The Appellate Court's characterization of this Court's opinion wholly ignores, among other things, this Court's express reference to permitting the political processes to function "free from judicial supervision." 409 U.S. at 5.

The Illinois Appellate Court's attempt to distinguish this Court's decision is invalid on its face. The Appellate Court states that "the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the Illinois delegates and challengers under the Illinois Election Code." (A.-132.) This is a distinction without a difference. The Illinois injunction against participation by petitioners in the National Convention was plainly "intervening in the Convention". Indeed that was its only and express purpose. If the purpose of the state court injunction had been effected, the 1972 Democratic National Convention would have been forced to seat respondents (or possibly to seat no delegates from Chicago). In view of the closeness of the Convention votes, it is entirely conceivable that the injunction could have affected the outcome of the Convention.* Moreover, the Circuit Court of Cook County has subsequently proceeded with contempt actions to punish petitioners for participation in the Convention. Such actions directly contravene the right of the Convention "to accept or reject, or accept with modification, the proposals of its Creden-

* If the Illinois court were correct, a California state court could similarly, on the eve of the 1972 Democratic National Convention, have dictated the outcome of the California credentials contest, and the state courts of the 49 other states would have comparable power, with the effect that the outcome of the national presidential nominating conventions of both political parties would frequently be determined by state court decisions. Prior to the 1952 Republican National Convention, for example, a state trial court in Georgia issued a last-minute decision regarding which of the two competing Georgia delegations was entitled to be seated at that Convention which, if the 1952 Republican Convention had been bound to follow it, might well have affected the Convention's outcome. (see pp. 58-60, *infra*)

tials Committee" (409 U.S. at 3) which this Court upheld in its July 7 decision.

The decision of the Illinois Appellate Court that "the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats" (A.-149) is contrary to this Court's decision permitting the 1972 National Convention to deny seats to the elected delegates from both California and Illinois in accordance with the historical understanding "since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.

There is also no basis for the suggestion of the Illinois Appellate Court that this Court's decision of July 7 was not concerned with "State laws, election of delegates or their rights" and that this Court's decision operated only to free the processes of the National Party from Federal and not state court intervention. (A.-132.) In both the Chicago and California cases, this Court was directly concerned with delegates elected in accordance with state law and this Court clearly acted to permit the 1972 National Convention, in the circumstances of the two cases, to refuse to seat such delegates. All of the principal grounds stated by this Court in its opinion apply by their terms to the prospect of state as well as Federal court action.

"[T]he large public interest in allowing the political processes to function free from judicial supervision," to which the July 7 opinion of this Court refers (409 U.S. at 5), is as applicable to the Circuit Court of Cook County as it is to the Supreme Court of the United States. The same

is true of the emphasis throughout this Court's opinion on the historical freedom under which "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (409 U.S. at 5.) The "[v]ital rights of association guaranteed by the Constitution" to which this Court refers (*id.* at 4) are equally threatened by state court action. Even more applicable to the actions of the Illinois court—since it acted on the night following this Court's decision—was this Court's emphasis upon the inadequate time available for judicial consideration of the issues on the merits, which consequently warranted judicial abstention and permitting the political process to go forward freely under the circumstances (*id.* at 3, 5.)

Petitioners submit that it was and remains clear that this Court intended, on July 7, 1972, to allow the National Convention to decide the contest, recognizing—in the circumstances of this case—that "the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4. The subsequently issued injunctions by the Circuit Court of Cook County, affirmed by the Illinois Appellate Court, were contrary to the July 7 decision of this Court.

In their Brief in Opposition to the Petition for Certiorari in this case, respondents offered an interpretation of this Court's decision of July 7, 1972 which is even more cryptic than that of the Illinois Appellate Court. Respondents state that:

> "[i]t is not reasonable to contend that this Court's explicit stay of an injunction [issued by the Court of Appeals for the District of Columbia] against the proceedings in the Circuit Court of Cook County, was,

in fact, intended to enjoin such proceedings in that court. Petitioners' interpretation does violence to the plain language of this Court's stay order." Respondents' Brief in Opposition to Petition for Certiorari at p. 9.

The short answer to respondents' contention is that petitioners do not contend that this Court's July 7 decision was "intended to enjoin" proceedings in the Circuit Court of Cook County. When this Court takes action in a case, it does not customarily issue an injunction to enforce that action, or, more specifically, to ensure that the unsuccessful litigants will not seek to relitigate the issues in another court and obtain relief contrary to this Court's decision. This Court assumes that state courts and other authorities "will give full credence" to its decisions without the necessity for the issuance of an injunction. See *Roe* v. *Wade*, 410 U.S. 113, 166 (1973). The plain fact is that the Illinois state courts did not, in the instant case, give "full credence" to this Court's decision of July 7, 1972.

B. This Court's Action on July 7, 1972 in Staying, But Not Vacating, the July 5 Judgment of the Court of Appeals for the District of Columbia Did Not Alter the Binding Collateral Estoppel and Res Judicata Effect of that Judgment So As to Permit Collateral Attack in the Illinois State Courts.

1. A stay of a Federal judgment does not alter its conclusiveness in other judicial forums.

Even if the explicit language of this Court's opinion of July 7, 1972 were ignored, under unambiguous Federal law

established by prior decisions of this Court, this Court's action in staying, but not at that time vacating, the July 5 judgment of the Court of Appeals for the District of Columbia did not alter the binding collateral estoppel and *res judicata* effect of that judgment so as to permit collateral attack upon that judgment in the Illinois state courts.

First. It has long been recognized that a judgment of a court of the United States must be accorded the same force and effect in a subsequent state court proceeding as that judgment is given in the rendering Federal forum. As this Court noted in *Embry* v. *Palmer*, 107 U.S. 3, 10 (1883): "[T]he judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced." See, *e.g.*, *Knights of Pythias* v. *Meyer*, 265 U.S. 30, 33 (1924) (judicial proceedings of Federal courts must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another State); *Deposit Bank* v. *Frankfort*, 191 U.S. 499, 516-517 (1903); *Hancock National Bank* v. *Farnum*, 176 U.S. 640, 645 (1900).

Second. This Court has consistently held that "whether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this Court, which will determine for itself whether such judgment has been given due weight or otherwise." *Deposit Bank* v. *Frankfort*, *supra*, at 515. See, *e.g.*, *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 129 n.1 (1941). See also *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 92 (1954). As Mr. Justice Bradley stated in *Dupasseur* v. *Rochereau*, 88 U.S. 130, 134 (1874):

> "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which . . . may be brought to this court for revision."

In *Stoll* v. *Gottlieb*, 305 U.S. 165, 167 (1938), this Court, in holding that the Supreme Court of Illinois had erroneously failed to give *res judicata* effect to orders of a Federal bankruptcy court, noted that "[p]rovisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts." See *Embry* v. *Palmer*, 107 U.S. 3, 9-10 (1883). See also *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 324 & n.12 (1971) (in Federal question cases Federal law of *res judicata* is applied).

Third. The rule in the Federal courts is that a judgment, even if it has been stayed during the pendency of an appeal, is nevertheless entitled to *res judicata* and collateral estoppel effect until such time as the judgment is modified, reversed or vacated by an appellate court. As this Court stated in *Huron Corp.* v. *Lincoln Co.*, 312 U.S. 183, 189 (1941):

> "[I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—*until and unless reversed—detract from its decisiveness and finality.*" (Emphasis added.)

See, *e.g.*, *United States* v. *Munsingwear*, 340 U.S. 36, 38 (1950);* *Stoll* v. *Gottlieb*, *supra*, at 170 (where judgment of Federal court determines a Federal right, that decision is final until reversed by an appellate court or modified by the rendering court); *Deposit Bank* v. *Frankfort*, *supra*,

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* In *Munsingwear*, this Court quoted the "classic statement" of the rule of *res judicata* enunciated in *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897):

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, *so long as the judgment in the first suit remains unmodified.*" 340 U.S. at 38. (Emphasis added.)

The first Mr. Justice Harlan went on, in *Southern Pacific*, to explicate the underlying rationale of the *res judicata* doctrine:

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." 168 U.S. at 49.

See *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464, 469 (3d Cir. 1950), where Judge Goodrich noted that "[t]he purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate." See generally Vestal, "Res Judicata/Preclusion: Expansion," 47 So. Cal. L. Rev. 357 (1974).

at 510-520; *Railway Co.* v. *Twombly,* 100 U.S. 78 (1879) (writ of error to Supreme Court, with duly approved and accepted supersedeas bond, does not vacate judgment below, which continues in force until reversed); *Woods Exploration & Producing Co.* v. *Aluminum Company of America,* 438 F.2d 1286, 1315-1316 (5th Cir. 1971). See also *Denham* v. *Shellman Grain Elevator,* 444 F.2d 1376, 1380 (5th Cir. 1971); *Prager* v. *El Paso National Bank,* 417 F.2d 1111, 1112 (5th Cir. 1969).

Professor Moore has summarized the law regarding the *res judicata* and collateral estoppel effect of unreversed judgments as follows:

> "A question more frequently encountered is whether conclusive effect in other litigation ought to be given a judgment from which an appeal has been taken. . . . *The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel,* unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo. *This is true even if the appeal is taken with a stay or supersedeas; these suspend execution of the judgment, but not its conclusiveness in other proceedings.* If the appellate court is limited to consideration of the trial record and to affirming, reversing, vacating or modifying the judgment under review, *the judgment stands as res judicata of the cause of action adjudged, and is entitled to collateral estoppel effect, until reversed, vacated or modified.* Thus a judgment either for plaintiff or defendant, although an appeal is pending, precludes another action between the same parties or their privies on the same cause of action; and in litigation on a different cause of action, is conclusive in favor of the winning litigant of all material issues that were litigated and adjudicated by the trial court's judgment." 1B Moore's Federal Practice ¶ 0.416[3], at pp. 2252-54. (Emphasis added and citations omitted.)

It should be emphasized that in its decision of July 7, 1972 this Court did not reverse or vacate the judgment of the Court of Appeals. On the contrary this Court stated that it was unwilling in the limited time available to render a final decision on the merits. 409 U.S. at 3.

This Court vacated the judgment of the Court of Appeals for the District of Columbia, and remanded the case to that Court for further proceedings, on October 10, 1972, only *after* the 1972 Democratic National Convention had been concluded and *after* both of the injunction orders at issue here were entered by the Circuit Court of Cook County. Thus, at the time the Circuit Court of Cook County entered both of its injunction orders and the 1972 Democratic National Convention took place, the procedural posture of this case was that the judgment of the Court of Appeals for the District of Columbia had been stayed by this Court, but had neither been reversed, vacated or modified by this Court. In these circumstances, the Illinois state courts clearly erred in permitting relitigation of the issues decided by the Court of Appeals. *E.g., Stoll* v. *Gottlieb, supra; Deposit Bank* v. *Frankfort, supra.*

2. The reasons given by the Illinois Appellate Court for rejecting the res judicata effect of the Court of Appeals judgment are erroneous.

The Illinois Appellate Court advanced a number of reasons for not accepting the *res judicata* effect of the Court of Appeals' judgment, all of which are erroneous.

The stay of the Court of Appeals' judgment did not alter its res judicata effect. The Illinois Appellate Court initial-

ly stated that "[c]onsidering first the stay order [entered by this Court on July 7, 1972], we hold it completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed." (A.-132.) Whether or not the Illinois Appellate Court was correct in its assertion that the stay order "froze the order of the Court of Appeals, including the injunction order," the conclusion that the stay order permitted the Circuit Court of Cook County to relitigate the issues previously decided by the Court of Appeals is simply a *non sequitur*. After this Court issued its stay order, the judgment of the Court of Appeals nevertheless remained outstanding, having been neither reversed, vacated or modified by this Court. As previously indicated (see pp. 30-33 *supra*), this Court has unequivocally held that a stayed, but unreversed, unvacated, and unmodified, judgment of a Federal court is entitled to *res judicata* and collateral estoppel effect.

The subsequent vacating of the Court of Appeals' judgment did not alter its res judicata effect at the time of the 1972 Democratic National Convention. The Illinois Appellate Court held that when this Court vacated the judgment of the Court of Appeals on October 10, 1972, the order of the Court of Appeals was rendered "non-existent and a nullity, as if it never existed." (A.-133.) The Illinois Appellate Court cited no authority for this proposition which, at a minimum, is both misleading and confusing in the context of the present case. At the time that the Circuit Court of Cook County entered the injunction orders that are now presented to this Court for review—and at the time the 1972 Democratic National Convention and the actions of petitioners, which are allegedly contemptuous of those orders, took place—the judgment of the

Court of Appeals remained outstanding (although stayed by this Court), and the Illinois Circuit Court therefore erred in refusing to respect the effectiveness of that judgment. *E.g., Deposit Bank* v. *Frankfort, supra,* at 510-515, and cases cited therein. See generally pages 28-33, *supra*. To argue, as did the Illinois Appellate Court, that the judgment of the Court of Appeals is to be treated "as if it never existed" is simply to contend that the law as established at the time of the Circuit Court's orders—and at the time of the actions of petitioners which are allegedly violative of the said injunctions—is to be ignored.

On February 16, 1973 the Court of Appeals for the District of Columbia reaffirmed the dismissal of respondents' complaint against the seating of petitioners in the 1972 Democratic National Convention. The Illinois Appellate Court stated that "[o]n February 16, 1973, the Court of Appeals [for the District of Columbia] determined the issues before it were moot and joined in the finding previously entered by the District Court for the District of Columbia, wherein the [petitioners] were denied the injunctive relief which they sought." (A.-133.) In fact, in its *per curiam* decision of February 16, 1973, 475 F.2d 1287, the Court of Appeals stated the following:

> "In the period intervening since the action of the District Court [July 3, 1972] the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation whose right thereto was contested by plaintiffs, Keane et al., in the District Court. Insofar as the complaint involved such right of representation the case thus became and is now moot.
>
> "Insofar as the complaint involves questions as to rights of the competing delegates to post-Convention representation in National Democratic Party matters,

we think the case is not moot. This court being advised, however, that these questions are pending before the Credentials Committee of the National Committee of the Party, we find no equitable basis upon which the District Court or this court should now intervene by declaratory or injunctive relief.

"Insofar as the case involves the request for injunctive or other relief sought by intervenor-defendants, Cousins et al., or previously though no longer sought by the National Democratic Party et al., defendants, we are also of the opinion that no exceptional circumstances appear to justify now the relief requested." (475 F.2d at 1288)

Thus, the Court of Appeals, on remand from this Court, stated that the Democratic National Convention had "act[ed] within its competence" in seating petitioners. As to post-Convention matters involving the National Democratic Party, and as to the collateral impact of its earlier judgment in the Illinois state court proceedings, the Court of Appeals did not find that the case was moot but denied relief on other grounds, not going to the merits.

The question of the present mootness of the case before the Court of Appeals makes no difference insofar as the *res judicata* effect of the Court of Appeals' judgment prior to the time that that judgment was vacated is concerned. At the time the Circuit Court of Cook County issued its injunctions and the actions of petitioners allegedly contemptuous thereof took place, the judgment of the Court of Appeals was outstanding, valid and binding, having not been reversed, vacated, or in any manner modified by this Court.

Furthermore, no support for the Illinois Appellate Court's view can be obtained from the fact that the Court

of Appeals on February 16, 1973, denied injunctive relief which had been sought by petitioners. The Court of Appeals expressly stated that it was denying injunctive relief, not because the case was "moot," but rather because of the absence of "exceptional circumstances" which would justify Federal intervention in pending state court proceedings.*

Finally the Court of Appeals on February 16, 1973, on remand from this Court, did not vacate the judgment of the District Court, and order that the case be dismissed as moot, but rather *affirmed* the judgment of the District Court dismissing respondents' complaint. (475 F.2d at 1288) The action of the Court of Appeals on February 16, 1973 in *affirming* the District Court's judgment of dismissal of respondents' complaint (with respect to which no review was sought in this Court) clearly preserves the *res judicata* effect of that judgment of dismissal.** (Pertinent portions of respondents' complaint filed in the District Court for the District of Columbia, the dismissal of

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* As noted earlier, the National Democratic Party urged the Court of Appeals that direct appeal through the Illinois courts, rather than a collateral Federal injunction, provided petitioners an appropriate avenue of relief from the Illinois injunction orders. See also *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (opinion of Mr. Justice Rehnquist, in Chambers).

** See *United States* v. *Munsingwear*, 340 U.S. 36 (1950), a case in which the United States filed complaints alleging violations of a regulation fixing the maximum price of commodities that the defendant sold and seeking both injunctive relief and treble damages. The equity aspect of the Government's cases was tried first, and the trial court concluded that the respondent's prices complied with the applicable regulations. On appeal, the Court of Appeals dis-

(Footnote continued)

which was affirmed by the Court of Appeals for the second time on February 16, 1973, are quoted at p. 9, *supra*.)

In fact, the Illinois Appellate Court established a consistent pattern of ignoring the judgments of the Court of Appeals for the District of Columbia. It did so in the first

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(Footnote continued)

missed the case as moot because, while the case was pending on appeal, price restrictions were removed on the commodity in question. The defendant then moved in the District Court to dismiss the treble damage actions on the ground that the unreversed judgment of the District Court in the injunction suit was *res judicata* as to the damage suits. The motion was granted by the District Court and affirmed by the Court of Appeals, whose judgment was in turn affirmed by this Court. In holding that the judgment of the District Court was entitled to *res judicata* effect, notwithstanding the fact that the case had been rendered moot while the appeal was pending, this Court noted that:

> "the question whether the respondent had sold the commodities in violation of the federal regulation, having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations . . . [u]nless the dismissal of the appeal on the ground of mootness . . . warrants an exception to the established rule." 340 U.S. at 38.

This Court held that "we see no reason for creating the exception" to the general principles of *res judicata* (*id.* at 39), noting that the government could have sought to vacate or reverse the judgment below and remand to the District Court with directions to dismiss. Because the Government had not sought this relief, this Court held that the initial judgment of the District Court was *res judicata*, noting that the case "illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation." 340 U.S. at 41. Moreover, this Court noted that "[d]enial of a motion to vacate could bring the case here. Our supervisory power over judgments of the lower federal courts is a broad one." *Id.* at 40.

instance by sustaining the two injunction orders of the state trial court which were issued while the July 5, 1972 judgment of the Court of Appeals was outstanding. Moreover, after the Court of Appeals, on February 16, 1973, upon remand from this Court, decided, *inter alia*, that the Democratic National Convention had "act[ed] within its competence" in determining to seat petitioners as the Chicago delegates, the Illinois Appellate Court took it upon itself to review the decision of the Democratic National Convention (A.-138.) and asserted a diametrically opposing view in holding that the Convention was "without power or authority to deny [respondents] their seats in the Convention." (A.-149.)

Respondents Were Parties to the District of Columbia Action and the Issue Involved in the Instant Case Was Adjudicated by the Court of Appeals for the District of Columbia. As a further reason why the judgment of the Court of Appeals for the District of Columbia, which had been stayed but not vacated by this Court, was not entitled to *res judicata* or collateral estoppel effect in the Circuit Court of Cook County, the Illinois Appellate Court stated that it "find[s] a near total lack of identity as to either issues or parties." (A.-133.) This argument is patently invalid as to both issues and parties. The Illinois Appellate Court concedes that the plaintiff class in both the Washington, D.C. case and the present case is precisely the same—that is, the challenged delegation, respondents herein. (A.-134.) Moreover, the ten individuals who initiated the challenge were defendants in both cases. After the full challenging delegation was selected, the additional members of that delegation were joined as additional parties defendant in this state court proceeding; but the ten original challengers clearly had the same interest as, and acted on behalf of, the full challeng-

ing delegation in the Washington, D.C. proceeding. Cf. *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 298 (1917). The National Democratic Party was a defendant in the Washington litigation, although it was not a party defendant in the Illinois state court proceedings; but clearly the presence of an additional party defendant in the Washington proceedings could not undermine the conclusiveness of the judgment of the Court of Appeals. Indeed, the Court of Appeals expressly noted in its opinion of July 5, 1972 that "all interested parties [were] represented in the federal forum." (A.-60.)

Even if it were assumed that there was some significance in the fact that the parties defendant in the Washington Federal court and Illinois state court litigation were not identical, this factor would be irrelevant in determining the *res judicata* and collateral estoppel effect of a Federal court judgment issued by a Washington, D.C. court.* The

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* As previously noted, in Federal question cases, the Federal law of *res judicata* is applied. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 324 & n.12 (1971). The well-established companion principle is that the credit which a judgment must receive is determined by the law of the rendering forum, *Caterpillar Tractor Co.* v. *International Harvester Co.*, 120 F.2d 82, 85-86 (3rd Cir. 1941), for "[o]ne of the strongest policies a court can have is that of determining the scope of its own judgments." *Kern* v. *Hettinger*, 303 F.2d 333, 340 (2nd Cir. 1962). See *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 439 (1943) (recognizing the "salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered"); *Restatement, Conflict of Laws, Second* §§ 93-95 (1971); R. Leflar, *American Conflicts Law* 166-171, 176-177 (1968). See also 1B *Moore's Federal Practice*, ¶ 0.416[3], at p. 2256, and cases cited therein (conclusiveness of a judgment pending appeal governed by law of the rendering forum).

Court of Appeals for the District of Columbia, in a series of decisions, has abolished the requirements of "privity among defendants" and "mutuality in the operation of the judgment's estoppel" where "the judgment is invoked defensively against a party or his privy who is reasserting essentially the same cause of action against a different person." *Lobel* v. *Moore*, 417 F.2d 714, 716-17 (D.C. Cir. 1969), and cases cited therein. In *Lobel* the Court of Appeals stated:

> "[I]t is not at all surprising to find a growing number of well considered cases holding that irrespective of privity among defendants and despite nonmutuality in the operation of the judgment's estoppel, a prior adjudication may be used to resist resurrection of the old cause of action against a new defendant.
>
> "Especially in these times when all courts, including our own, are struggling with crowded and growing dockets, we are sensitive to the persuasive force of these precedents and the cogent reasons underlying them. And our own jurisprudence leaves us free to pursue a similar course, for the rule of mutuality, which frequently has appeared as something of an obstacle elsewhere, is not embedded in the decisions of this court. On the contrary, without so much as a hint that mutuality was a problem, we have sometimes permitted nonparties to judgments to assert their binding effect against those who were parties to it." 417 F.2d at 717. (Footnote omitted.)

More recently, this Court in *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1971), abolished the doctrine of mutuality of estoppel, in the context of multiple patent infringement suits, questioning "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue."

Id. at 328.* In the course of its opinion, this Court quoted with approval the test established by Justice Traynor in *Bernhard* v. *Bank of America Nat. Trust & Savings Ass'n*, 19 Cal.2d 807, 813, 122 P.2d 892, 895 (1942):

> " 'In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?' " 402 U.S. at 323-324.

With regard to identity of issues, the Illinois Appellate Court was simply wrong in its assertion that the issues decided in the Washington, D.C. litigation did not include the question subsequently decided in the Illinois state court.** In both instances, the applicability of the Illinois

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* See *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917), where this Court noted that the doctrine of *res judicata* "is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

** The opinion of the Illinois Appellate Court may be read to hold that there must be an identity of *all* issues before *res judicata* may be asserted. This view is clearly wrong insofar as it is applied to determine the *res judicata* effect of Federal judgments. As this Court stated in *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 90-91 (1954):

> "We have often held that under the doctrine of *res judicata* a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation." (Citations omitted.)

Election Code to the delegate-selection process—and whether that Code exclusively governed the qualifications of delegates to a National Party Convention—was at issue. The Illinois Appellate Court sought to distinguish the prior adjudication of the Court of Appeals for the District Court of Columbia by quoting the statement of that Court, wrenched from its context, to the effect that "No violation of Illinois law is at issue here." (A.-134.) In fact, the Court of Appeals made that statement in the context of considering, and expressly rejecting, respondents' argument that their election under Illinois law required that they be seated in the National Democratic Convention, despite the Rules of the National Democratic Party. The full quotation from the Court of Appeals' opinion reads as follows:

> "The challenged delegates claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. *The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the challenged delegation.* No violation of Illinois law is at issue here. The Illinois election law is, by itself not incompatible with guideline C-6 of the McGovern Commission. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent. *The right of a national political party to determine*

> *the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addition to a valid party regulation.* To hold otherwise would severely limit the freedom of association of the party itself." (A.-54.) (Emphasis added.)

The Court of Appeals stated "we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law." (A.-57.)

Respondents' Petition For a Writ of Certiorari to this Court, filed July 6, 1972, contains an extensive description of the Illinois Election Code (at pp. 2-5) and argues that "where the right to political party office is regulated by a fair and non-discriminatory state statute, internal decisions or rules of party officials cannot divest a person duly selected in accordance with law of the right to hold such office." (at p. 18 *et seq.*) This is precisely the same argument subsequently made by respondents in, and adopted by, the Illinois court. (A-144.) See also respondents' complaint to the same effect in the District of Columbia Federal court action quoted at p. 9, *supra.*

There is no basis for the contention that the issue involved in this case had not been litigated by respondents (unsuccessfully) in their Federal court action. The most that can be said is that the Illinois courts disagreed with the result of respondents' Federal court action in regard to the relationship between state law and the National Party Rules. But mere disagreement with the prior decision and judgment of a Federal court offers no basis whatsoever for the state court's refusal to respect that prior judgment. Indeed, even if it were assumed that the Federal

court was *incorrect* in its analysis of the role of state law in determining the qualifications of National Convention delegates, the judgment of that court was not subject to collateral attack in the Illinois state courts. *E.g., Stoll* v. *Gottlieb, supra,* at 170-172; *Deposit Bank* v. *Frankfort, supra.* Cf. *Sutton* v. *Lieb,* 342 U.S. 402, 408 (1952).

The July 7 Decision of this Court and the July 5 Decision of the Court of Appeals Were Presented and Argued to the Trial Court Judge. Finally, the Illinois Appellate Court stated that petitioners had failed "to preserve their argument, based on the res judicata effect of the decision of the U.S. Court of Appeals for the District of Columbia in the record." (A.-134.) In fact, however, the record clearly shows that the July 5 decision and judgment of the Court of Appeals, as well as the July 7 decision of this Court, were both presented to the trial court judge on July 8, 1972, during the course of the emergency hearing on respondents' motion for a temporary injunction and petitioners' motion to dismiss the complaint. Both opinions appear as exhibits in the record of the trial court proceedings. (Report of Proceedings of July 8, 1972 at pp. 29-30 and related exhibits.)

As this Court has held, a federal question—in the present case, the effect of a Federal court judgment in subsequent state court proceedings—must be raised in a timely manner in the state courts, but

> "[n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67 (1928).

See, *e.g., Brown* v. *Western Ry. of Alabama,* 338 U.S. 294, 298-99 (1949).

In the circumstances of the instant case, it is clear that the issue of the conclusive effect of the Court of Appeals' prior judgment was brought to the attention of, and its effect was argued to, the trial judge, who, after considering the decision and judgment of the Court of Appeals and the July 7 decision of this Court, rejected petitioners' *res judicata* claim on the merits.

In summary, respondents, having chosen in the first instance to seek to reverse the Democratic Credentials Committee's decision on the Chicago contest in the Washington, D. C. Federal courts, and having lost in the District Court, the Court of Appeals, and finally, at a Special Term, in the Supreme Court of the United States, were not entitled to proceed to relitigate the issues in the case in the Cook County trial court in an effort to obtain a different result. See, *e.g., Blonder-Tongue* v. *University Foundation,* 402 U.S. 313, 320-330 (1971); *Stoll* v. *Gottlieb,* 205 U.S. 165, 170-172 (1938). To permit respondents to relitigate the issues merely because they were dissatisfied with the result reached by the Federal courts would be to sanction a wholesale, entirely unjustifiable, departure from the salutary principles of *res judicata.* As Professor Vestal has stated:

> "Where a party has picked his court, and his defendants and the issue to be tried, and has then lost in the litigation, it would seem to be entirely reasonable to say that he is precluded from litigating a second time the issues decided. Is it not entirely fair to implement the general policy of preclusion by holding that such a party is bound by the determination made in the first suit? The plaintiff in Suit I has had his day in court under conditions entirely of his choosing. To allow this party to relitigate the issues so adjudicated would seem to be entirely inconsistent with the generally accepted rationale of preclusion." A. Vestal, *Res Judicata/Preclusion* 314 (1969).*

Nothing in the *per curiam* opinion of this Court of July 7, 1972 staying, but not vacating, reversing or modifying, the judgment of the Court of Appeals suggested any intention to permit relitigation of the issues in an Illinois state court. To the contrary, this Court's opinion expressly stated that its action was intended to permit the Democratic National Convention to exercise its historical right to resolve controversies over the seating of National Convention delegates. It was during the period that the stayed judgment of the Court of Appeals was outstanding and unvacated that the Circuit Court of Cook County entered its orders purporting to bar conduct which the Court of Appeals had expressly authorized. The actions of the 1972 Democratic National Convention and petitioners during

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* A more recent analysis by Professor Vestal has particular pertinence to the actions of respondents in attempting to circumvent the judgment of the Federal courts by resorting to the state courts:

> "[T]he courts in some cases found that the two suits were related in some tactical sense, that is, that someone had deliberately arranged for the litigation to occur serially as it did to achieve a certain tactical advantage. The courts seem to indicate an unwillingness to 'play games.' There is a reluctance to allow courts and lawyers to go beyond decision-making and engage in proceedings that are seen as repetitious and nothing more than a method by which lawyers are kept busy and courts are kept crowded, and which serve no socially desirable end. In fact, the repetitive proceedings are seen as socially destructive—something which should not be allowed. Finally, some courts seemingly find the possibility of inconsistent judgments very undesirable. The symmetry of the law—which has been for a long time one of the bases of preclusion—is listed as an end to be sought." Vestal, "Res Judicata/Preclusion," 47 So. Cal. L. Rev. 357, 374 (1974). (Footnotes omitted.)

this period were taken under the explicit protection of the judgment of the Court of Appeals, as well as the July 7 decision of this Court.

II.

A STATE CANNOT CONSTITUTIONALLY DEPRIVE A NATIONAL POLITICAL PARTY, AND CITIZENS SEEKING TO ASSOCIATE AS MEMBERS OF SUCH NATIONAL PARTY, OF THE RIGHT TO DETERMINE THE COMPOSITION OF A NATIONAL POLITICAL PARTY CONVENTION IN ACCORDANCE WITH NATIONAL PARTY RULES, STANDARDS AND PRINCIPLES.

This case presents the unprecedented situation in which a single State asserts that it has power to interfere in a fundamental way with the freedom of citizens to engage in National Political Party activities. The Illinois Appellate Court held that the 1972 Democratic National Convention was "without power or authority" to decide which of the two contesting delegations should be seated to represent the Chicago districts in the National Convention. (A.-149.) According to the Illinois Court:

> "The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code." (A.-139.)

The Illinois court held that "the law of the state is supreme and party rules to the contrary are of no effect" (A.-143.) and that:

> "Once elected, any question of the delegates' [respondents'] qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts." (A.-144.)

The Illinois Appellate Court therefore held that the Circuit Court of Cook County had the power to issue injunctions against petitioners' participation in the 1972 Democratic National Convention and in Democratic National Committee affairs—notwithstanding the decisions of the Democratic Party's Credentials Committee and of the delegates to the 1972 Democratic National Convention itself that petitioners, and not respondents, should be seated.

The holding of the Illinois court is without precedent. It represents a drastic interference with the rights of citizens to engage in National Political Party affairs as those rights have been understood and exercised since the founding of our National Political Parties. If the Illinois court is correct that the right to sit as a delegate to a National Political Party Convention is "governed exclusively" by Illinois law, then the National Political Party is effectively denied the right to establish and enforce national rules, standards and principles of its own.

Further, if the courts of the State of Illinois can enforce such a doctrine, then so can the courts of the other 49 States. Thus, to take another example from the 1972 Democratic National Convention, the State of California could have barred the seating of the challenging delegation (not chosen in accordance with California law) in the California contest. Similarly, in the case of virtually every other contest in which the National Conventions of both political parties have historically exercised—or may seek in the future to exercise—their right to decide controversies over the seating of delegates, a state court could, under the holding of the Illinois Appellate Court, dictate the result by enjoining the participation of the contesting delegation.

The composition of a National Party Convention—in substance the definition of the National Party and what it stands for—would no longer be determined by the National Party itself, but rather by the state courts. The manner in which the state courts would actually exercise this power could vary from State to State. Thus, for example, requirements of National Party loyalty might be enforceable as to delegates from New Hampshire but not those from Nevada, National Party rules barring closed slatemaking by local parties might be valid in Ohio but not in Illinois, National Party principles of non-discrimination might apply in Texas but not in Mississippi.

Such a holding conflicts with the most fundamental political rights of our National Political Parties to define themselves and to exist and function as national political organizations. It conflicts with the fundamental rights of citizens to associate freely together in National Political Party activities.

A. For almost a century and a half the National Political Parties themselves have decided contests over the seating of delegates to their National Conventions, rejecting the proposition that they are bound to seat delegates selected in accordance with state law.

As emphasized in this Court's *per curiam* opinion when this controversy first came before the Court:

> "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.

Even the most cursory reading of the proceedings of our National Political Party Conventions demonstrates that, for almost a century and a half, the exercise of the power to determine their own composition has been a central feature of their activities as National Political Party organizations.

The supreme governing body of a National Political Party is its National Convention which assembles every four years pursuant to an official Call issued by the Party's National Committee. The Call specifies the number and allocation of Convention delegates and the basic rules and principles to govern their selection and qualifications. Both National Parties currently permit a variety of delegate selection methods to be utilized (direct election, caucus, convention, committee and appointment) subject to the basic standards set forth in the Call. See generally *Nomination and Election of the President and Vice President of the United States, Including the Manner of Selecting Delegates to National Political Conventions* (R. Hupman & R. Thornton, ed. January, 1972); *Choosing the President* (League of Women Voters of the United States, 1968). The Convention has the ultimate power to select the party's nominees for President and Vice-President of the United States. "The delegates, or a majortiy of them, can declare the party's official position on issues affecting public policy and make rules governing all aspects of the party's national organization and operations." Goodman, *The Two-Party System in the United States* 181 (1964).

Political scientists emphasize that "The Conventions do something that no other organ of the American system does: . . . they supply, however imperfectly, one great need of the American system, the nationalizing

of party politics." D. Brogan, *Politics in America* 234 (1954). See *Choosing the President* 19 (League of Women Voters of the United States, 1968) ("The national convention is the national party. It is at the heart of the national party system.") The various state political parties are "affiliated with a national party through acceptance of the national call to send delegates to the national convention." *Ray* v. *Blair,* 343 U.S. 214, 225 (1952).

Among the very first actions taken at the first National Democratic Convention in 1832 and at the first National Republican Convention in 1856 was the appointment of a Credentials Committee to determine and resolve contests over the composition of the Convention. * Since that time, at virtually every National Convention of both Political Parties, contests over the seating of delegates have been heard and decided by the National Committees (in determining the temporary roll of delegates) in some cases, by the Credentials Committees or—as in the case of the 1972 Chicago contest—on the floor of the Convention itself.

In the Republican Party there have been credentials disputes at the National Conventions in 1860, 1864, 1868, 1872, 1876, 1880, 1884, 1888, 1892, 1896, 1900, 1904, 1912, 1916, 1920, 1924, 1928, 1936, 1948, 1952 and 1956. In the Democratic Party there have been credentials disputes at the Conventions in 1832, 1836, 1848, 1852, 1856, 1860,

* Official Proceedings of the 1856 Republican National Convention at p. 21; R. Bain, *Convention Decisions and Voting Records* (Brookings, 1960) at 17. The official proceedings of both parties' National Conventions are hereinafter referred to as "Democratic Proceedings" and "Republican Proceedings".

1864, 1880, 1884, 1888, 1892, 1896, 1900, 1904, 1908, 1912, 1920, 1928, 1932, 1936, 1944, 1948, 1952, 1956, 1964, 1968 and 1972. See generally R. Bain, *supra.*

In resolving such contests the National Parties have looked to their own procedural rules, National Party policies and principles and a variety of political interests directed toward strengthening the National Party and advancing the ideas and interests to which it is committed.* Both Parties have rejected the proposition that they are bound to seat delegates chosen in accordance with a state law. See generally pp. 54-67, *infra.*

Even apart from its significance in demonstrating the importance of credentials contests as a feature of the free political activity of our National Political Parties, this history has independent significance in the interpretation of the Constitution as it applies to National Political Parties. In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), this Court noted the relevance of longstanding historical practice in considering the validity under the First Amendment of property tax exemptions for religious organizations. 397 U.S. at 678. Mr. Justice Brennan, concurring, articulated the relevance of the history of the exemption:

> "The existence from the beginning of the Nation's life of a practice, such as tax exemption for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in

* See, *e.g.,* Brief of John Minor Wisdom, et al. on Behalf of Louisiana Delegates Representing New Republican Leadership in Louisiana, submitted to the 1952 Republican National Convention:

> "The importance of the Louisiana contest lies in its effect on the development of a decent, active Republican party leading to a two-party system in the South." (at p. 6)

the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court's interpretation of the Clause accordingly, is appropriately influenced by the reading it has received in the practices of the Nation. As Mr. Justice Holmes observed in an analogous context, in resolving such questions of interpretation 'a page of history is worth a volume of logic.' *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921). The more longstanding and widely accepted a practice the greater its impact upon constitutional interpretation." 397 U.S. at 681. *

1. The Republican Party Experience

In credentials contests as early as 1880—even before the adoption of state primary laws—the Republican National Convention, in debating whether to enforce in all States a principle of Congressional district delegate election (as opposed to statewide election), was faced with the argument that "this is a matter entirely in the discretion of the Republicans of the several States." (Minority Report of the Credentials Committee, 1880 Republican Proceedings at p. 53.) Further it was argued:

> "The proposition now is for the National Convention here assembled to deny the right of the State convention of the State of Illinois [one of the states involved

* See also *Ray* v. *Blair,* 343 U.S. 214 (1952) (discussed more fully at pp. 71-72, *infra*), involving the constitutionality of a Democratic Party requirement that candidates for presidential elector pledge to support the nominees of the Democratic National Convention, where the Court noted that the "long-continued practical interpretation of the constitutional propriety of an implied or oral pledge . . . weighs heavily when considering the constitutionality of a pledge." 343 U.S. at 229-230.

> in the contests], acting as a convention, to determine the methods by which the delegates to a National Convention be elected . . . . The various States in the Union will not tolerate it and will not accept the doctrine that the National Convention, made up of all the States, shall dictate the methods of proceeding to the convention of any State." *Id.* at pp. 60-61.

The Republican National Convention, however, rejected the State supremacy argument and made its decision on various contests on the basis of "the adoption in the National Convention of the principle of Congressional district representation" (Majority Report of the Credentials Committee, 1880 Republican Proceedings at p. 49). The majortiy defended its decision on the ground that this method of selection best served "the purpose to be secured in nominating a President [which] is the selection of a candidate the most likely to be accepted by the people." *Id.* at p. 50.

Following those contests, the 1880 Republican National Convention directed the Republican National Committee to set forth in the Call for the 1884 National Convention the methods to be used for the selection of delegates to the future Conventions. 1880 Republican Proceedings at p. 160. The Republican National Committee added language to the Call to the 1884 Convention requiring that a portion of the delegates be selected in Congressional District elections or conventions and that at-large delegates be selected by a statewide process. 1884 Republican Proceedings at p. 4.

In 1888 the Republican National Convention enforced these Call provisions in deciding contests from Virginia. The challengers contended that various district conventions held under the auspices of the official Virginia State

Party Committee violated the Call in that they were held outside the Congressional district involved. The supporters of the "official" delegates argued that they had been chosen at district conventions called by the State Committee and that "the organic law upon which the Republican party operates in the State of Virginia vests all and every power in the State Committee." (Remarks of Delegate Bingham, 1888 Republican Proceedings at p. 75.) Further it was argued as to the challengers that "their conventions were unlawfully called and held [and] their title is inherently and fundamentally defective, and they have no more right to seats on this floor than any other body of unauthorized strangers." Minority Report of the Credentials Committee, *Id.* at p. 66. Nevertheless, the Convention rejected the "official" delegates and seated the challengers. According to the majority supporters:

> "It is a question of the call of the National Executive Committee, and it must be met; it must be responded to, whatever may be the consequences, by the election of delegates in the manner the call requires." (Remarks of Delegate Moore, *id.* at p. 79)

In 1896, the Republican National Convention faced a large number of credentials contests. In the Delaware contest it was conceded that the "regular" delegation, headed by J. Edward Addicks, had been elected by the members of the state convention who had in turn been chosen in primary elections. The majority of the Credentials Committee and the Convention, however, seated the challengers on the ground that Addicks was a disloyal Republican (because he had been involved in efforts to defeat a Republican Senator) and further his majority "was secured by the use of money, by bribery and purchase of voters at the primary." (Remarks of Delegate Yerkes, 1896 Republican Proceedings at p. 54) The minority argued that "there was no proof of any character considered by your Committee" and that to seat the challengers was to deny "the principle of the right of free representation." (Remarks of Delegate Hepburn, *id.* at pp. 55, 57). However, the principal spokesman for the majority stated:

> 'I claim that this Convention is by the rules of its own organization, and is by necessity, not only judge of the election of its members, but is judge of them and of the propriety of their admission to a seat." (Remarks of Delegate Yerkes, *id.* at p. 54)

In 1912 the Republican Party was faced with numerous credentials contests between the Taft and Roosevelt forces. Roosevelt forces challenged the credentials of 252 Taft delegates and three days of the Convention were occupied solely in determining the initial roll of delegates. California had adopted a statewide winner-take-all primary law. The Republican National Convention, however, refused to seat all California delegates elected in accordance with state law on the ground that the primary violated the principle of Congressional district representation set forth in the Convention Call. Instead the Convention seated a contesting delegation chosen at the Congressional district level. 1912 Republican Proceedings at pp. 202-12. The Credentials Committee report stated that "a state law could not supersede the Call of the National Committee as directed by the Republican National Convention, the supreme organ of party regularity." *Id.* at p. 219. The 1912 Republican Convention also refused to seat delegates selected in accordance with Texas law. *Id.* at pp. 109, 286.

At the 1928 Republican National Convention the posture of the Republican Party in relation to state delegate selec-

tion laws was reemphasized in a contest over the seating of the Texas delegation. It had apparently been suggested that the Convention was bound to seat the "regular" Texas delegation because its members were chosen in accordance with Texas state law, to which Judge Daniel O. Hastings of Delaware replied:

> "I submit to you that this is a principle that has been followed by the Republican Party since its existence, and not until now, as far as I know, as far as anybody has suggested, not until now has it been questioned; not until now have we had brought to our attention the question as to whether or not a legislature in Texas, a Democratic legislature in Texas, shall pass a law which shall be binding upon the great Republican National Convention.
>
> "I contend that the Republican National Convention is an organization of its own and makes its own laws. And the state of Texas has nothing to do with it." (Remarks of Delegate Hastings, 1928 Republican Proceedings at p. 54)*

At the 1952 Republican National Convention the issue came up again particularly in relation to the Georgia challenge which was critically involved in the Taft/Eisenhower contest for the presidential nomination. See generally G. Mayer, *The Republican Party 1854-1966* 488-90 (1967). The faction constituting the Taft delegation had obtained a Georgia state court judgment affirming that it was the lawful Republican Party in Georgia. Indeed the proponents of the Taft delegation stated that:

> "In several separate actions the courts of the state of Georgia have declared that the Foster organization [the Taft delegation] is the legal Republican group in the state of Georgia." (Remarks of Delegate Thomson, 1952 Republican Proceedings at p. 173)

* The Chairman of the Credentials Committee immediately agreed with Judge Hastings that "the Republican National Convention makes its own laws." *Id.* at p. 59.

A proponent of the Taft delegation appearing before the National Convention stated:

> "I hold in my hand here a certified copy of the judgment of Judge Byars [the Georgia trial court judge], dated the 30th day of June, 1952 [7 days prior to the Convention]." (*Id.* at p. 174)

He noted that "Judge Byars had refused to grant a supersedeas and his judgment still remains unchanged in the court of the State of Georgia" and the judgment (which "ordered, considered and adjudged that the plaintiffs, the Foster delegation, are declared to be the legal Republican Party in Georgia") was read aloud. *Id.* at pp. 173-74.

The 1952 Republican National Convention nevertheless rejected the Taft Georgia delegation. In the course of the debate, Delegate Gordon X. Richmond of California stated:

> "I believe that this National Convention is absolutely the last authority, the supreme court in deciding who shall have credentials to this Convention, and it shall not be dictated to by the State Court of Georgia or by any other court." *Id.* at p. 168.

Governor Alfred E. Driscoll of New Jersey stated:

> "This Convention is the sole judge of the qualifications of its own members. That is the first point. Two, the decision of a lower court in Georgia is not binding upon Republican tribunals nor can its decision be dispositive of the issues before this great Convention.

"And, three, if we adopt the Majority Report we would be establishing a dangerous precedent.

• • •

"I have spent the best years of my life strengthening the judicial system in my State. I have a healthy respect for the American judicial system. I have also a healthy respect for the judicial system of Georgia. But I submit to you that this is the supreme court of Republicanism and is the proper tribunal before which the issues raised by the contest must be settled. (Applause)

"Secondly, we have no right to allow our jurisdiction to be limited, for to do so would be to tie our hands and perhaps permit all kinds of judicial decisions to prevent us carrying on our business.

"We and we alone are the sole judges of the qualifications of our members. It is a responsibility that we can not delegate.

"While we all can respect the courts, we must all abide by our own responsibilities." *Id.* at p. 169.

It was also noted in the course of the debate at the 1952 Convention that a judge in Mississippi had issued a judgment regarding which contesting Mississippi delegation was recognized under Mississippi law, but the Credentials Committee and the Convention seated the challengers. *Id.* at p. 170.

It should be emphasized that neither in Georgia or Mississippi in 1952—nor, to petitioners' knowledge, in any other case in the history of our National Party Conventions—did a state court judge do what Judge Covelli, the Cook County Circuit Court judge, did in the 1972 Chicago case on the eve of the National Convention—that is, purport to *enjoin* a contesting delegation from participating in a National Party Convention.

2. The Democratic Party Experience

The Democratic Party, like the Republicans, has faced and resolved credentials contests over a wide variety of issues at its National Conventions since its first convention in 1832. See generally R. Bain, *supra*. At the early Conventions various procedural issues had to be resolved for the first time.* Often the contests involved competing factions within the state parties—for example, a long series of contests involved Tammany and anti-Tammany forces in New York—and frequently were resolved by splitting the votes between the contesting delegations.**

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* For example, in 1836 there were two contesting Pennsylvania delegations and ultimately the Convention decided to seat both groups in a compromise which, according to the Convention reporter, "satisfied neither party." (R. Bain, *supra*, at p. 21). Prior to the vote, however, the question arose for the first time of whether contested delegates should be allowed to vote in the Convention prior to resolution of the contest. That same issue was a central focus of debate at the 1912 Republican National Convention, the 1952 Republican National Convention and (insofar as it involved the California delegates) the 1972 Democratic National Convention. Under the Democratic Party Rules in effect in 1972, petitioners were placed on the temporary roll of delegates by the Democratic National Committee but were not allowed to vote on the Chicago contest.

** In 1884 two factions—the "Hunkers" and the "Barnburners"—presented contesting delegations from New York and an entire evening and all of the next day were devoted to debate, finally resolved by splitting the vote between the two delegations. (R. Bain, *supra*, at pp. 36-38). The idea of splitting the vote between two contesting delegations was one adopted in the case of a large number of contests at future conventions—*e.g.*, Georgia in 1852, New York in 1856, Massachusetts in 1880—down to more recent decisions such as the 1968 decision to split the Georgia vote between the Lester Maddox and Julian Bond delegations (see pp. 65-66, *infra*).

Often the resolution of contests has had important political consequences. In 1896, for example, a "Silverite" majority in the National Convention reversed a decision by the Democratic National Committee (which was controlled by "Gold" forces) on several contests and, among other things, seated a "Silverite" delegation from Nebraska headed by William Jennings Bryan. R. Bain *supra* at p. 155. Bryan subsequently delivered the famous "Cross of Gold" speech and he ultimately became the Party's presidential nominee.

In 1908 the Democratic National Convention rejected the delegates chosen in a primary held under Pennsylvania law on the ground that the primary had been distorted by the votes of Republican "raiders." 1908 Democratic Proceedings at pp. 101-103. The minority argued unsuccessfully that this action was contrary to the "certified returns of this election" and that the challengers, who consisted primarily of losing candidates in the election, "had no credentials." (Remarks of Delegate Strauss, *id.* at p. 104).

In 1912 a South Dakota contest involved a primary in which a "Wilson-Bryan" slate had received a plurality and were the winners under state law. However, the State Democratic Party, contrary to the state election authorities, had certified to the National Convention an alternative slate pledged to Champ Clark on the ground that that slate, together with a slate pledged to "Wilson-Bryan-Clark," had received a majority of the primary votes. After extensive debate, the Convention ultimately held for the Wilson-Bryan slate by a vote of 639½ to 437. R. Bain, *supra* at 187.

In 1928 the Democratic National Convention saw the first of several Louisiana contests. The Louisiana state executive committee, dominated by Huey Long, had chosen

the delegates who were seated by the Credentials Committee. A minority report stated the argument, unsuccessfully, that always before Louisiana had had a convention to choose its delegation, and that the state executive committee's actions had been "contrary to law, precedent and without authority." 1928 Democratic Proceedings at p. 38. In 1932 the Long-dominated state committee again chose a delegation. This time a minority report was presented on behalf of a contesting delegation headed by Frank J. Looney, which included ex-governors and other prominent Louisiana citizens, "all of whom were trying to break the hold of the Long machine in Louisiana." R. Bain, *supra,* at p. 237. Governor Huey Long argued his own case before the Convention, stating at the outset that, if he was defeated, the Democratic electors would be taken off the ballot in Louisiana. (Remarks of Delegate Long, 1932 Democratic Proceedings at p. 61) He also accused the challengers of deliberately holding their own convention only a few days prior to the National Convention and he claimed:

> "They knew that if they had held this convention in time for us to have gone to court we would have gone to court and got out an injunction against them to keep them from coming here with that kind of fiasco. No; they called that rump convention in Shreveport just before they were to meet in Chicago so that they could get out of the state before we could slap on an injunction and stop them from coming up here." *Id.* at p. 64.*

Long was ultimately successful but only by a narrow margin of 638¾ to 514¼. *Id.* at pp. 67-68. See generally R. Oulahan, *The Man Who . . . The Story of the Democratic National Convention of 1932* (1971).

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* This appears to be the only instance prior to 1972 in which such an injunction was even threatened against a contesting delegation.

In 1944 the Democratic National Convention faced a Texas contest which was the first of a series of contests involving the "loyalty" of Southern delegations. A. Holtzman, *The Loyalty Pledge Controversy in the Democratic Party* 1-4 (Eagleton Institute Cases in Practical Politics, Case No. 21, 1968). The Texas "regulars" argued that they alone had been properly elected at the State Democratic Convention and that under Texas law the Supreme Court of Texas had held that the "regular" convention was lawful. (Remarks of Delegate Willis, 1944 Democratic Proceedings at p. 86) But the challengers, who had held a "rump" convention, charged that the regular convention had not named Democratic electors who were pledged to support the nominee of the Democratic National Convention. (Remarks of Delegate Jones, *id.* at p. 87-89). The Credentials Committee split the Texas votes between the two delegations, and that decision was upheld on the floor of the Convention. *Id.* at p. 91.

In 1948 the Democratic National Convention faced a similar "loyalty" contest over the seating of the delegates chosen under Mississippi law who had publicly threatened to withdraw from the National Convention if it failed to repudiate President Truman's civil rights policy. A minority report opposing the seating of the "regular" Mississippi delegation was presented, but was defeated. 1948 Democratic Proceedings at p. 104.

A large number of southern Democrats did refuse to support the Democratic ticket in 1948 and supported a third party ticket headed by Governor J. Strom Thurmond of South Carolina. In some cases they succeeded in placing Thurmond electors on the state ballots under the name of the Democratic Party. As a result there was strong concern in 1952 to assure the party loyalty of all delegates. The National Convention adopted a resolution

refusing to seat any delegates—however selected—unless they took a "loyalty oath." 1952 Democratic Proceedings at pp. 55, 73.

After the 1952 Democratic National Convention the Democratic National Committee appointed a special committee to deal with the "loyalty" issue. This committee produced a new "loyalty" rule which was incorporated into the Call of the 1956 Democratic National Convention. In 1964 the Democratic National Convention determined that the Alabama state party had violated this rule and the Convention refused to seat the delegates elected under Alabama law unless they took a "loyalty oath." 1964 Democratic Proceedings at pp. 4-5. Almost none of the Alabama delegates were willing to take such an oath and they were not seated. *Ibid.* Again in 1968, the Democratic Convention determined that the Alabama party had violated this rule and this time it not only refused to seat the elected Alabama delegates who refused to take an oath but it seated in their place members of a contesting delegation. 1968 Democratic Proceedings at p. 206.

In 1964 the Mississippi Freedom Democratic Party mounted a challenge to the "regular" Mississippi delegation on the ground of disloyalty to the National Party and racial discrimination in Mississippi state Democratic Party affairs. That Convention refused to seat the challengers. However, in a compromise, it was agreed that delegations to all future National Conventions should be subject to a requirement of full racial equality in all state party affairs. 1964 Democratic Proceedings at pp. 30-31.

In 1968 the Democratic National Convention decided that the Mississippi Democratic Party had not lived up to the non-discriminatory standard set forth in the Call and it refused to seat the entire "regular" delegation, chosen under Mississippi law, and seated a contesting

delegation. 1968 Democratic Proceedings at p. 248. In part on the same grounds, that Convention also deprived the delegation chosen in accordance with Georgia law of one-half of their votes and gave them to a contesting delegation. A challenge to the delegation chosen in accordance with Texas law was defeated on the floor of the 1968 Democratic National Convention. Fifteen other contests were heard by the Credentials Committee. See generally Schmidt and Whalen, "Credentials Contests at the 1968—and 1972—Democratic National Conventions," 82 Harv. L. Rev. 1438, 1446-1465 (1969).

The 1968 Democratic Convention directed that a Commission be established to study delegate selection procedures and adopt new rules governing delegate selection. That Commission held a series of hearings and in April, 1970, the Commission reported to the Democratic National Committee proposing new rules to be incorporated into the Call of the 1972 Democratic National Convention. See Commission on Party Structure and Delegate Selection to the Democratic National Committee, *Mandate for Reform* (April, 1970). The new rules were proposed because of the conclusion that there were "profound flaws in the presidential nominating process; . . ." (*id.* at 9) and that present processes were "inadequate for assuring the opportunity for widespread participation." *Id.* at 8. Further, new rules were deemed necessary to insure a "strong, winning and united Party." *Id.* at 51.

The Democratic National Committee issued the Official Call of the 1972 Democratic National Convention incorporating the new rules. Pursuant to that Call the delegates to the 1972 Democratic National Convention assembled in Miami, Florida on July 10, 1972. In addition to the Chicago contest, a total of 81 contests involving 1230 delegates from 32 states and territories were filed with the 1972 Credentials Committee. Many of the contests were

compromised or dismissed prior to the 1972 Convention. In various cases (in addition to Chicago) delegations chosen under state law were altered or modified. See Report of the Credentials Committee to the 1972 Democratic National Convention 85 (July 8, 1972). The rules set forth in the Call were the basis for petitioners' challenge against respondents.

B. The holding of the Illinois Appellate Court would deprive citizens associating together in a National Political Party of the constitutional right, inherent in the fundamental nature and necessary to the functioning of National Party organizations, to determine the composition of their National Party Conventions in accordance with National Party rules, standards and principles.

The holding of the Illinois Appellate court in this case would bring the resolution of credentials contests and the determination of the composition of National Party Conventions by the National Political Parties themselves—which, as discussed above, has been the practice for almost 150 years—to an end. If state law exclusively governs the qualifications of National Convention delegates, as the Illinois court held, then the right of the National Party to determine the composition of its National Convention in accordance with its own rules and principles is abrogated. Only persons approved by a state court could be seated in the National Party Convention, regardless of whether (as the National Democratic Party found in the case of respondents) those persons have deliberately and grossly violated basic National Party rules and principles. Petitioners submit that such a holding is in direct conflict with the constitutional right of American citizens to associate together in a National Political Party on the basis of national rules, standards and principles.

This Court has repeatedly held that the freedom to participate in political party activity is protected by the First and Fourteenth Amendments. In *Kusper* v. *Pontikes*, 414 U.S. 51 (1973), this Court recently said:

> "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." 414 U.S. at 58-59.

In that case this Court held that a provision of Illinois law barring voting in a particular primary election by persons who had voted in the primary of another political party within the preceding 23 months "conspicuously infringes upon basic constitutional liberty" depriving citizens of the "constitutional freedom to associate with the political party of their choice." 414 U.S. at 60-61. The present case involves injunctive orders that even more "conspicuously infringe upon basic constitutional liberty" by depriving Illinois citizens—and citizens from throughout the nation—of the right to associate together in accordance with National Party rules and principles.

In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), Mr. Justice Black, writing for the Court, said:

> "We have repeatedly held that the freedom of association is protected by the First Amendment. And of course this freedom is protected against federal encroachment by the First Amendment and is entitled under the Fourteenth Amendment to the same protection from infringement by the states." 393 U.S. at 30-31.

In that case this Court held that the State of Ohio could not condition access to its general election ballot upon a political party meeting a series of stringent conditions,

requiring extensive organization and other election activities at an early date. In the present case the State of Illinois asserts a right, not to condition access to its ballot upon political parties meeting certain approved conditions, but rather a right to *enjoin* activities of individual citizens and a National Political Party of which it disapproves—specifically the enforcement of any National Party rules or principles in relation to the Illinois delegates to a National Convention.

In *DeJonge* v. *Oregon*, 299 U.S. 353 (1936), this Court reversed a criminal conviction of persons who had attended a meeting of the Communist Party. Chief Justice Hughes, writing for the Court, stated:

> "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. [citations omitted] The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States* v. *Cruikshank*, 92 U.S. 542, 552: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances.' " 299 U.S. at 364.

In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1957), Mr. Justice Harlan wrote for a unanimous court:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect to the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. at 460.

Similarly, in *NAACP* v. *Button*, 371 U.S. 415 (1962), Mr. Justice Brennan stated:

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was

> enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." 371 U.S. at 415 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-51 (1957)

See also *Bates* v. *Little Rock*, 361 U.S. 516, 522-23 (1960).

The freedom to engage in National Political Party activity is inherently a freedom which cannot be restricted by state lines. A National Party is the vehicle through which citizens throughout the nation, in various States, associate with one another for the advancement of common political objectives—particularly the selection of a nominee who can succeed in being elected President of the United States. What the Illinois Appellate court held, however, is that the State of Illinois can tell the citizens of the other 49 States, assembled in a National Party Convention, which persons from Illinois they could, or could not, associate with. Correspondingly, the Illinois court claims the right to enjoin its own citizens from associating with persons from other States in a National Political Party Convention—despite the decision of that Convention that it wished to have them participate.

It should be emphasized that the Illinois court does not merely assert the right of the State to conduct a process, utilizing the state election machinery, for the selection of National Convention delegates and to advise the National Party by initial certification, or by subsequent declaratory judgment, of the result. See *Riddell* v. *Nat'l Dem. Party*, 344 F. Supp. 908 (S.D. Miss. 1972) (appeal pending No. 72-2437, 5th Cir.) (in which the court issued a declaratory judgment that the so-called "Regulars" were chosen in accordance with Mississippi law, while the so-called "Loyalists" were not, but the court expressly refused to

enjoin participation of the "Loyalists" in the 1972 Democratic National Convention). Cf. *Roudebush* v. *Hartke*, 405 U.S. 15 (1972). The Illinois court claims power to *enjoin* participation in a National Party Convention of those persons whom the National Party has determined are its legitimate representatives from the State of Illinois. Such an injunction constitutes in substance a prior restraint upon the exercise of First Amendment freedoms, including the freedom of association, of a type repeatedly condemned by this Court. See, *e.g.*, *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).*

In *Ray* v. *Blair*, 343 U.S. 214 (1952), this Court upheld against constitutional attack the action of the Chairman of the Alabama Democratic State Committee in refusing to certify a candidate for presidential elector who refused to sign a pledge to support the nominee of the Democratic National Convention. This Court noted that "such a provision protects a party from intrusion by those with adverse political principles." 343 U.S. at 221-22. This Court further stated:

> "Neither the language of Art. II, § 1, nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party. Unless such a requirement is implicit, certainly neither provision of the Constitution requires a state political party, affiliated with a national party through acceptance of the national call to send state delegates to the national convention, to accept persons as candidates who refuse to agree to abide by the party's requirement." 343 U.S. at 225.

In rejecting the constitutional challenge to the practice of the Alabama party, this Court stated:

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* The same trial judge who issued the injunction reversed by this Court in *Organization for a Better Austin* v. *Keefe*, *supra*, issued the injunction against petitioners in the instant case.

> "A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party." 343 U.S. at 227.

It is the same fundamental interest of a political party in being able to establish its own "political principles" and serve the "aims of the party" which is threatened by the decision of the Illinois Appellate Court in this case.

Any of dozens of major credentials contests at National Party Conventions could be cited to illustrate the way in which the power to determine the composition of the National Convention has been central to the functioning of our National Political Parties—*e.g.*, the long series of contests in which the National Republican Party has established its basic alignments in the South, the Democratic "loyalty" contests of the 1940's and 1950's, the Democratic Party's decision in the 1960's to deny seating at future National Conventions to the representatives of state parties which have not assured full racial equality, and so forth. The activities involved in the 1972 Chicago case are a particularly dramatic instance of the exercise of these basic constitutional political rights.

The challenge by petitioners against respondents in 1972 produced a series of confrontations—before a hearing examiner appointed by the Democratic Party, then (after the examiner determined that respondents had engaged in "covert, calculated and deliberate violation" of the National Party Rules) before the Credentials Committee consisting of delegates from each State, and finally (after the Credentials Committee voted to seat petitioners) before the various state delegations and on the floor of the Democratic National Convention itself (see pp. 5-9, *supra*). After rejecting a last-minute motion to compromise the contest by seating both delegations, the delegates to the Democratic National Convention finally voted to

seat petitioners, and not respondents, as the Chicago delegates. In addition to reflecting the Convention's judgment as to who it regarded as the Party's legitimate representatives from Illinois, this decision had a significant impact on the national posture and policies of the Democratic Party and was, in part, determinative of who the Party's candidates would be in 1972. In its brief to this Court in *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972), prior to the 1972 Convention, the National Democratic Party summarized the overall situation as follows:

> "After much internal discussion, the members of the party adopted a set of far ranging reforms designed to promote democratic participation at all levels of the process for selecting delegates to the Democratic National Convention, the highest organ of the party. And in this case they are seeking to enforce those reforms by refusing to seat at the convention delegates selected in violation of them. In taking this action the Credentials Committee of the National Convention has sought to vindicate the internal rules of the party so as to protect the right of all Democrats to participate in the party's decision-making processes and thereby make the party attractive to the public and the electorate. These are interests which the party has a First Amendment right to pursue." Memorandum for Respondents, National Democratic Party, at p. 11 (July 6, 1972).

Respondents were wholly free—and vigorously exercised the right—to debate the wisdom of the Democratic Party's decision on the Chicago contest. But petitioners submit that the right of the persons assembled in the Democratic National Convention to make that decision was—as in the case of other credentials contests at National Conventions in the past—at the very heart of the constitutionally protected freedom of petitioners and other citizens throughout the nation to associate together in a National Political Party and the right of that National Party to define itself and to exist and function as a National Political Party organization.

C. The holding of the Illinois Appellate Court is totally without judicial precedent.

No court, state or Federal, has ever before purported to enjoin persons from participating in a National Political Convention in accordance with the decision of that Convention that they should be seated.

When respondents instituted this action, petitioners filed a petition for removal of the action to Federal District Court for the Northern District of Illinois. As noted earlier, Judge Hubert L. Will determined that the action should be remanded to the state court because the Federal constitutional issues (*i.e.*, the First and Fourteenth Amendment rights of free political association of petitioners and the National Democratic Party) arose only in defense. *Cousins* v. *Wigoda,* 342 F. Supp. 82 (N.D. Ill. 1972). However, in remanding the case, Judge Will stated:

> "*This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.* The proper forum for determination of the eligibility of delegates to serve in such a convention is the Credentials Committee of the party or the convention." (Emphasis added.) (A.-12-13.)

Subsequently, in respondents' Federal court action, this Court stated that "no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy and essentially political in nature" (409 U.S. at 4.) This Court upheld the right of the 1972 Democratic National Convention, in the circumstances of the case, to seat the delegates elected under Illinois and California law, or the contesting delegations, or possibly some combination of the two. *Id.* at 3.

After the 1972 Democratic National Convention, the Court of Appeals for the District of Columbia stated on remand from this Court:

> "[T]he 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs Keane, et al. [respondents] . . ." (475 F.2d at 1288.)

In *Riddell* v. *National Democratic Party,* 344 F. Supp. 908 (S.D. Miss. 1972) (appeal pending No. 72-2437, 5th Cir.), a case arising immediately prior to the 1972 Democratic National Convention, the District Court determined that the "Regulars" had complied with the Mississippi statutes and that the "Loyalists" delegation, in contrast, was "not arrived at by any statutory process." 344 F. Supp. at 922. The court therefore issued a declaratory judgment "that the Regular faction is the legal, official Democratic Party of the State of Mississippi, and that the Loyalist faction is not." *Id.* The court declined to grant any further relief at that time, however, other than to find "that the Regulars are entitled to a hearing before the Credentials Committee and the full Convention if necessary, under any procedure or arbitration that will afford both factions an opportunity to be heard fully on the merits of their respective claims." *Id.* Subsequently, the Credentials Committee voted to seat the "Loyalists" instead of the "Regulars" as the Mississippi delegates. The "Regulars" then went back to the District Court asking for the kind of relief granted by the Illinois court in the instant case—namely an injunction against the participation of the "Loyalist" delegation in the National Convention. The court denied any such relief, acknowledging

the right of the National Convention to make its free political choice:

> "Part of the relief requested here is to enjoin the so-called 'Loyalists' from participating in the National Democratic Convention, but to do so would serve no plausible purpose. To do so would prohibit each and every democrat in Mississippi from having a voice in the selection of a candidate for President and Vice-President of the United States to run as a National Democrat.
>
> "To refrain from enjoining the Loyalists would at least grant each and every Democrat in Mississippi the privilege or right to speak through some group to the National Convention. The group selected might not voice the opinion of the majority of the electorate of Mississippi, but if not, that is the selection of the national organization, and the national organization takes its political risk—whether the potential stakes are good, bad—or just political." 344 F. Supp. at 923.

Petitioners do not suggest that the District Court in *Riddel* was correct in adjudicating in any manner the controversy which was before it. But it is notable that even that court, which was willing to rule upon certain aspects of a credentials controversy, clearly rejected the notion that it could, as the Illinois court purported to do, enjoin the participation in the National Convention of persons the Party's Credentials Committee and its Convention had voted to seat as delegates. This view is consistent with that of Judge Will who, in remanding the present case to the state court, noted that "it is difficult to imagine any thoughtful court granting the type of relief requested in the instant case." (A.-16.)

The Illinois Appellate Court cites various state court decisions which it claims are in support of its decision (A. 141-144.) But these authorities do not in fact support state court intervention into the process of a National Political Party convention. Indeed, there appear to be only two state court decisions which even *consider* the possibility

of such intervention and both expressly reject any such proposition.

In *State ex rel. Cook* v. *Houser*, 122 Wis. 534, 100 N.W. 965 (1904), which the Illinois Appeliate Court cites erroneously and at length (A.-142.) in *support* of its decision, a Wisconsin state court was asked to determine *after* the 1904 Republican National Convention whether the anti-LaFollette delegation (which had been seated at the National Convention) had the right to prevent state officials from placing on the ballot as Republicans candidates representing the LaFollette faction (who were recognized under state law but had been denied seats in the Republican National Convention). The Wisconsin court held that the anti-LaFollette faction had no such right under Wisconsin law. In coming to this conclusion the Wisconsin court expressly noted that:

> "whether the National Republican Convention decided right or wrong, for itself, in determining which of the sets of delegates applying for seats in such convention as regular Republican delegates from this state, were entitled to be recognized as such, *we have nothing whatsoever to do.*" 100 N.W. at 983. (Emphasis added.)

In 1936 an Alabama state court was asked to require the Alabama Democratic State Executive Committee to hold an election to choose National Convention delegates in accordance "with party custom and usage." The state court rejected the suit on the ground that no Alabama statute required an election and further stated:

> "The candidates in question are delegates to a national convention. No order or decree of this court could be enforced against that convention. *That body [the national convention], and not the courts, will be the final judge of who shall represent Alabama.*" *Smith* v. *McQueen*, 232 Ala. 90, 166 So. 788, 791 (1936). (Emphasis added.)

None of the other state court cases cited by the Illinois

Appellate Court even involves delegates to a National Political Party Convention.*

* Most of the other cases cited by the Illinois Appellate Court involve state regulation of *state* political party affairs, a wholly different question not involving the fundamental conflict between a single State and the rights of citizens throughout the nation to engage in National Political Party activities. Even in the state context, moreover, courts have acknowledged as a constitutional right "the inherent power of a political party to adopt principles and policies and to require its members and especially its officials, to adhere thereto" and "the inherent right of a political party to expel any official whose actions and beliefs are antagonistic to announced principles." *Anderson* v. *Millikin*, 186 Wash. 602, 59 P.2d 295, 297 (1936). Petitioners are not aware of any reported state court decision upholding an injunction against persons participating in a state political party convention or meeting.

It is significant that the law in Illinois as announced by the Illinois Supreme Court is entirely consistent with the position announced by this Court on July 7, 1972 in *Keane* v. *National Democratic Party* and in the cases cited above. In *People* v. *McWeeney*, 259 Ill. 161 (1913), the defendant faced a situation substantially identical to that of the petitioners here. An Illinois lower court had enjoined the defendant from participating in the nominating meeting of a political organization. Thereafter, the defendant was prosecuted for violating the injunction. The Supreme Court of Illinois held:

> "The general rule is well established that the judicial department of the government has no right to interfere with or attempt to control a citizen in the exercise of political rights unless the jurisdiction is expressly given by statute or by clear implication. On account of the grave consequences which might result both to the courts and the people if the courts were to take jurisdiction of political matters, it has always been held that they have no right to interfere in those matters at all. The courts cannot be drawn into political contests of any sort or description unless required by statute, and *any injunction for the purpose of restraining or controlling acts of a political nature is void and may be disobeyed without accountability to the court.*" (Emphasis added.) 259 Ill. at 172.

Thus, in granting the last minute injunction against petitioners in this case, Judge Covelli ignored not only the binding *res judicata* effect of the prior decisions in *Keane*, but also ignored the law as enunciated by the Supreme Court of Illinois in *McWeeney*.

In the entire history of credentials contests at our National Party Conventions there is not a single precedent for the action of the Illinois court in enjoining participation in such a Convention.* When faced with the issue, every state and Federal court—with the exception of the Illinois courts in this case—has rejected the proposition that state law exclusively governs the seating of National Convention delegates and that persons not selected in accordance with state law may therefore be enjoined from participating in a National Party Convention.

D. The Nomination of Candidates For President and Vice President Of the United States Is a Matter Within the Power of the National Political Parties.

1. No State has power to dictate to, or restrict or veto activities of, a National Political Party in relation to the nomination of candidates for President or Vice President of the United States.

Article II, Section 1 of the Constitution gives to each State the power to "appoint, in such Manner as the Legis-

* See also Brooks, *Political Parties and Electoral Problems* 326 (1933). ("They [the National Conventions] may . . . admit or reject delegations at will regardless of the primary election laws of any state"); Goodman, *The Two-Party System in the United States* 602 (1964) ("decisions [certifying election results] even by state officials would not be binding on a national convention"); Portnoy, "Freedom of Association and the Selection of Delegates to National Political Conventions," 56 *Cornell L. Rev.* 148, 149 (1970) ("Whatever the law, the national convention's power to judge the qualifications of delegates thereto has apparently never been challenged, so the party has the means to enforce its rules on delegate selection"); Schmidt and Whalen, "Credentials Contests at the 1968—and 1972—Democratic National Conventions," 82 *Harv. L. Rev.* 1438, 1457 (1969) |"[T]he National Convention cannot be bound by a given state's laws to seat delegates chosen in accordance with those laws").

lature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . ." The 12th Amendment in turn prescribes the manner in which the Electors shall choose the President and Vice President of the United States. The States' power to appoint Electors may constitutionally be exercised in a variety of ways. See generally *McPherson* v. *Blacker*, 146 U.S. 1, 28-35 (1892). To the extent an electoral process for appointing electors is established by a State, it must adopt procedures for nominating candidates for Elector, and in most States such nominations are made by the state party committees. See Longley & Braun, *The Politics of Electoral Reform* 29 (1972).

There is nothing in the Constitution, however, which gives to the States any role in the selection of nominees for President and Vice President of the United States. Such nominees have been selected by the National Political Parties in various ways since the founding of the nation.

The initial Presidential nominations—after the election of George Washington who was chosen by "national consensus" not requiring any real nomination—were made by caucus of the members of Congress belonging to the different National Parties. See Goodman, *The Two-Party System in the United States* 151-53 (1964). Jefferson, Madison, Monroe and John Quincy Adams were chosen as Presidential nominees by this caucus method. *Id.*

The caucus method of choosing Presidential nominees fell out of favor in the 1820's and Andrew Jackson campaigned against it—derisively labelling it "King Caucus" —in 1824. See R. Goldman, *The Democratic Party in American Life* 42 (1968). The next few years were ones of "experimentation with forms" for making Presidential

nominations. Goodman, *supra* at 163. Nomination of Presidential candidates by state legislatures or state conventions was tried to some extent in 1824 and 1828, but "the appropriateness of any kind of state machinery for national organization was very dubious even if it were feasible." *Id.* at 163.

By the 1830's, commentators note, "The transportation system of the county was improving; for the first time, geographical barriers were being surmounted sufficiently to permit a national congregation." Goodman, *supra,* at 163. Thus, 1832 saw the first National Party Conventions and by 1840 this new method of making presidential nominations was well-established. See Davis, *Springboard to the White House* 22-25 (1967). Pursuant to a Call issued by the National Party Committee, delegates have assembled every Presidential election year, allocated among the various States in accordance with a variety of formulas which have evolved over the years.*

There is no constitutional restriction upon a National Political Party's adopting alternative mechanisms for making Presidential nominations such as a national primary, regional processes, the caucus system or a Convention with diverse methods of selecting delegates.** Certainly there is nothing in the Constitution which requires that a National Party give any recognition at all to a State, as a unit, in its nominating process:

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* The Conventions have also, on the whole, seated representatives from the various Territories (in some cases without voting rights), although in the nineteenth century this was often a contested issue. See, *e.g.*, 1868 Republican Proceedings at pp. 13-14; 1876 Democratic Proceedings at pp. 40-42.

** For recent proposals see, e.g., *New York Times,* April 8, 1972 at 12 (proposed regional processes); *Task Force on Democratic Party Rules and Structure of the Coalition for a Democratic Majority, Toward Fairness & Unity for 1976* at 10-11 (1973) (proposal to seat all Senators and Congressmen in the National Conventions).

"For reasons of political expedience and convenience, the parties in practice have chosen to focus their procedures for the selection of delegates to the national nominating conventions upon the various states. If, however, the national parties should choose to abandon the states in favor of some other geographical subunit for purposes of delegate selection, the Constitution would not impede them. For example, the parties could focus their delegate selection procedures on a regional basis using the federal judicial circuits or the federal executive regions as the appropriate geographical units for selecting delegates to their national conventions." Blumstein, "Party Reform, the Winner-Take-All Primary, and the California Delegate Challenge: The Gold Rush Revisited," 25 Vand. L. Rev. 975, 988 (1973).

What the decision of the Illinois Appellate Court amounts to is a holding that because a National Party chooses to allocate a portion of its Convention delegates on the basis of state boundaries (or to districts within a particular State), the National Party thereby forfeits entirely to the State its fundamental right to determine who shall participate in its National Convention and what rules, standards and principles its delegates are obligated to uphold. There is no constitutional support for such a holding.

The one common characteristic which must be maintained by any alternative mechanism for nominating a Presidential candidate is that it must ultimately be a national process. The objective is to choose a candidate who can achieve a nationwide majority of the electoral votes. As stated in *Bode* v. *National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971):

"In the arena of Presidential politics, the primary function of a national party convention . . . is to select among a field of available persons Presidential and Vice-Presidential candidates most competent to perform the duties of office, yet capable of attracting a sufficient number of popular votes to carry the requisite number of States in the election. This process of sorting and unification requires a judgment exercised toward maintaining and enlarging party appeal on a national scale." 452 F.2d at 1309.

See also *Irish* v. *Democratic-Farmer-Labor Party*, 287 F. Supp. 794, 805, aff'd, 399 F.2d 119 (8th Cir. 1968). The States may decide to appoint their Electors in a variety of ways; but "a party must be organized nationwide in order to command a majority of the elector votes." Goodman, *supra*, at 33.

The concept of a State being able to restrict the freedom to engage in such a Presidential nominating process is contrary to its inherently national character. A National Party establishes and operates its nominating process with a view to achieving its national political objectives—particularly nominating and electing a President and Vice President of the United States. Particular States (and their legislatures and courts) may or may not approve of particular National Party processes or actions—*e.g.*, the Illinois courts disapproved the seating of petitioners in the 1972 Democratic National Convention, a court in Mississippi disapproved the seating of the Mississippi "Loyalists."*

* An extreme instance of such local disapproval of National Party activities is contained in the proceedings of the Republican National Conventions prior to and during the Civil War and Reconstruction eras when Republican delegates from the southern States frequently reported facing mobs and threats of violence for attending a Republican National Convention. See, *e.g.*, 1860 Republican Proceedings at pp. 112-113.

A National Party may choose not to have a National Convention at all, or to allocate delegates by regions, or not to allocate any delegates to a particular State, or to have all of the delegates from a State consist of designated officeholders. Subject to possible constitutional limitations not involved in this case (or conceivably to Congressional regulation), these are matters within the ultimate power of the National Political Parties and not the States. There is, of course, nothing in the Constitution which *bars* any State from conducting a process for the selection of National Convention delegates. But a State cannot dictate to a National Party that it accept certain State-approved delegates, notwithstanding applicable National Party rules and principles.

This Court has recognized that there are certain rights of citizens which are inherent in the constitutional structure of our national government. In *Crandall* v. *Nevada,* 73 U.S. 35 (1867), this Court upheld the constitutional right of citizens to travel freely from State to State. This Court stated:

> "The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted.
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> • • •
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> That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered.
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> • • •

> "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the subtreasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." 73 U.S. at 43-44.

The right of citizens to participate in a Presidential nominating process—to join together with citizens of other States to try to choose a nominee who can obtain a nationwide majority in the Electoral College and lead the nation as President—is a right of this fundamental character.

In addition to its other sources of protection, this right of citizens to participate in National Party affairs is protected from state interference by the Privileges and Immunities Clause of the Fourteenth Amendment. Mr. Justice Harlan, dissenting in *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), noted that this Court has consistently adopted a restrictive view of the Privileges and Immunities Clause:

> "The view of the Privileges and Immunities Clause which has most often been adopted by the Court and by individual Justices is that it extends only to those 'privileges and immunities' which 'arise or grow out of the relationship of United States citizens to the national government.' Hague v. CIO, 307 U.S. 496, 520 (1939) (opinion of Stone, J.)" 394 U.S. at 667.

Even under this restrictive view, the right to attend a National Party Convention or otherwise participate in a national process to select and promote a nominee for President of the United States is protected by the Privileges and Immunities Clause.

In *Hague* v. *CIO*, 307 U.S. 496 (1939), Mr. Justice Stone stated:

> "The privileges and immunities of citizens of the United States . . . are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws." 307 U.S. at 520, n. 1 (opinion of Mr. Justice Stone).

Mr. Justice Roberts in his opinion in the same case stated that the Privileges and Immunities Clause of the Fourteenth Amendment protected the right of citizens to assemble peacefully to discuss the merits of Federal legislation. 307 U.S. at 512.

In *United States* v. *Cruikshank*, 92 U.S. 542 (1876), this Court stated:

> "*The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guaranteed by, the United States.* The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." 92 U.S. at 568-69. (Emphasis added.)

In that case, this Court held that the right of free assembly generally is protected by the First Amendment, but that the right to assemble for the purposes of petitioning Congress "or for anything else connected with the powers and duties of the National Government" is additionally protected, as an attribute of United States citizenship, by the Privileges and Immunities Clause of the Fourteenth Amendment. The right to assemble together to nominate and promote a candidate for President of the United States is, therefore, protected by that Clause.

In the *Slaughterhouse Cases*, 83 U.S. 36 (1873), Mr. Justice Miller stated that: "The right to peaceably assemble and petition for redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution." 83 U. S. at 79.

The applicability of the Privileges and Immunities Clause leaves open the possibility of Federal Congressional restrictions upon the activities of National Political Parties in the Presidential nominating process. See *Burroughs and Cannon* v. *United States*, 290 U.S. 534 (1934). *Cf. Shapiro* v. *Thompson*, 394 U.S. 618, 668 (1969) (dissenting opinion of Mr. Justice Harlan).* It is possible that certain types of national regulation of National Political Parties could be reconciled with the freedom of political association guaranteed by the First Amendment. But just as the unexercised power of Congress to regulate interstate commerce limits the States in attempting to do so, see, *e.g.*, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), by analogy the absence of Congressional regulation of internal processes of National Political Parties is an additional signal that

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* Congress may also have certain powers to regulate National Political Parties in connection with enforcement of other provisions of the Fourteenth and Fifteenth Amendments. See, *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

they should be free of the kind of state restriction attempted to be imposed by the Illinois Appellate Court in this case. See also *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 625 (1973), quoting, *Cooley* v. *Board of Port Wardens,* 53 U.S. 299, 319 (1851) ("Whatever subjects of [the power to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to require exclusive legislation by Congress.")

As stated by Judge Will, for the 50 States to determine "the qualifications and eligibility of delegates to national political party conventions" is "an obviously intolerable result." (A.-13.) It is contrary to the inherently national character of the Presidential nominating process—and in conflict with the constitutional right of citizens of the United States to engage in that process—for any State to be able, as the Illinois court asserts, to bar the application by a National Party Convention of its own national rules and principles and to bar the participation in such a Convention of persons whom the assembled delegates have voted to seat.

2. No Violation of the Constitutional Rights of Respondents Is Involved in This Case.

The Illinois Appellate Court grounded its decision on the unprecedented proposition that "[t]he right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code." (A.-139.) However, the Illinois court also engaged in an extensive review of the actions of the 1972 Democratic National Convention, the Credentials Committee, and the Hearing Examiner, and concluded that "the due process and equal protection rights" of respondents were

violated and that the actions of petitioners and the National Democratic Party in this case were unconstitutional. (A.-150.)

The statements of the Illinois Appellate Court represent an extraordinary assertion of power to consider constitutional claims of respondents in the present posture of this case. In the first instance, these statements of the Illinois Appellate Court are directly contrary to the final judgment of the Court of Appeals for the District of Columbia issued on February 16, 1973 in respondents' Washington, D.C. Federal court action. There can be no dispute that the constitutional claims of respondents under the equal protection and due process clauses of the Fourteenth Amendment were fully and finally adjudicated in that action. In that case, the Court of Appeals for the District of Columbia, on remand from this Court, stated:

> "[T]he 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs, Keane, et al., [respondents] in the District Court." 475 F.2d at 1288.

The Court of Appeals affirmed the judgment of the District Court below, dismissing respondents' complaint, over the objection of respondents who unsuccessfully sought to have the District Court judgment vacated and dismissed. See discussion at pp. 13, 35-39, *supra.* Respondents did not seek any review of the February 16, 1973 judgment of the Court of Appeals.

Further, respondents have asserted that they are not raising constitutional issues in this case nor do they claim that their constitutional rights have been violated; rather, they ground their claim solely on state law. Indeed when petitioners sought to remove this case to the Federal

District Court for the Northern District of Illinois, respondents vigorously asserted in a motion to remand the case to the Circuit Court of Cook County that no constitutional issues were presented by their complaint. As a result, Judge Will remanded the case to the Circuit Court of Cook County. (A.-8.)*

Irrespective of the foregoing, and considering the statements of the Illinois Appellate Court with regard to the constitutional issues on their merits, petitioners submit that those statements are clearly erroneous.

To begin with, the Illinois Appellate Court wholly ignores what this Court previously described as the "highly important question" of "whether the action of the Credentials Committee is state action." 409 U.S. at 4. Lower Federal courts have noted the difficulty posed by this requirement in the context of National Political Party activities. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F.2d 119 (8th Cir. 1968); *Smith* v. *State Executive Committee of Democratic Party of Georgia,* 288 F. Supp. 371, 375 (N.D.Ga. 1968). The Illinois court makes no findings of any kind which would warrant a conclusion that the activities of the National Democratic Convention are "state action" subject to the Fourteenth Amendment. Indeed, the court describes the National Convention as "a voluntary association," which is inconsistent with any such notion. Elsewhere the court states that due process and equal protection rights have been "abrogated by the actions of defendants [petitioners]." It is difficult to see

* "Plaintiff's action was commenced in the Circuit Court of Cook County for a declaration of rights and injunctive relief under state statutes. . . . No federal question is presented by the complaint." Motion of Wigoda, et al. for Remand and Temporary Restraining Order Pending Ruling, filed April 24, 1972, at p. 2.

how the actions of petitioners—a group of citizens who chose to bring a challenge to the seating of respondents under rules and procedures established by the National Democratic Party—could, under any conceivable theory, constitute "state action" within the meaning of the Fourteenth Amendment. See, *e.g., Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 171-179 (1972). Compare *Reitman* v. *Mulkey,* 387 U.S. 369 (1967); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

The Illinois Appellate Court's statement that respondents' "due process" rights were violated appears to be premised on the court's examination of the findings of the Hearing Examiner appointed by the National Democratic Party. As noted earlier, the Examiner was the Honorable Cecil F. Poole, former United States Attorney for the Northern District of California. Examiner Poole held hearings in Chicago, received evidence and heard argument from both sides, and issued the Report (A.-20.), which was presented to the National Party's Credentials Committee.

The Appellate Court's references to that Report are, almost without exception, erroneous. The Poole Report did not "ignore the State law," as the Appellate Court states (A.-139.); the Report expressly acknowledged that respondents were elected at the Illinois primary (A.-24.) and that the Democratic Party in Illinois had taken steps to bring the Illinois Election Code into conformity with the National Party Rules (A.-29.). Moreover, respondents were wholly free and vigorously exercised the right to argue in the Credentials Committee and in the National Convention that, because of their election in accordance with state law, they should be seated in the Convention.

The Poole Report did not state that the underrepresentation of racial minorities, women and young people on the delegation was "proof of actual discrimination by itself" as the Appellate Court quotes (A.-139.). The Appellate Court leaves out the word "not" in the quotation. The Poole Report states:

> "It [such underrepresentation] would *not*, however, be proof of actual discrimination by itself." (Emphasis added.) (A.-37.)

It is on the basis of its misquotation of the Poole Report on the last point that the Illinois Appellate Court concludes that there was "deliberate distortion of the facts by the hearing examiner" (A.-139.).

The fact is that the Democratic Party's procedures in relation to the Chicago credentials contest in 1972 were among the most extensive and fair in political party history. The National Democratic Party Rules themselves were laid down explicitly in the official Call of the National Convention more than a year before the Convention.* When petitioners instituted the challenge, an Examiner was appointed and hearings were held in which respondents participated fully. Subsequently, respondents argued their case—on whatever grounds they chose—before the Credentials Committee and the National Convention. It is not at all clear that a National Political Party is obligated to engage in any such elaborate procedures; the more customary practice has been for contests to go directly to the Credentials Committee (or the National Committee) and then to the floor of the National Convention for decision.

* Respondents have never argued that the actions of the National Party were not taken in accordance with explicit and announced National Party Rules. The Hearing Examiner noted, among other things, testimony that Mayor Richard J. Daley told a meeting of the Chicago committeemen that he "didn't give a damn" about the Rules. (A.-30.)

With regard to a possible violation of "equal protection rights" the Illinois Appellate Court's statements are even more cryptic. (A.-150.) Respondents were found to have deliberately violated explicit and announced National Party Rules. No claim or finding was made in the court below that those Rules were unconstitutional. (Such a claim was, of course, made by respondents and rejected by the Court of Appeals for the District of Columbia prior to the 1972 Democratic National Convention.) The statement of the Illinois Appellate Court appears to mean that the enforcement of *any* National Party Rules in relation to a primary election violates the equal protection clause. It is conceivable that the equal protection clause would prohibit a National Party from establishing and enforcing certain types of rules.* But it is difficult to see on what basis the Fourteenth Amendment could be read to prohibit enforcement of *any* rules or principles in relation to delegates chosen in a primary election. In effect the Illinois Appellate Court merely restates as involving "equal protection" its basic assertion that the Illinois Election Code "exclusively governs" the qualifications of National Convention delegates. When respondents asserted their equal

* See the dissenting opinion of Mr. Justice Marshall and cases cited therein. 409 U.S. at 6. It should be noted that even those courts which have held that the actions of National Political Parties are subject to constitutional limitations under the Fourteenth Amendment have acknowledged that those limitations must be interpreted in a manner which gives recognition to the wide range of factors which are a legitimate part of political party decision-making. See, *e.g.*, *Bode* v. *National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971).

protection claims prior to the 1972 Democratic National Convention, the Court of Appeals for the District of Columbia rejected them unanimously, stating:

> "The Democratic National Party determined to make participation in the nomination process as democratic as possible. This exercise of the Party's power over the qualifications of the delegates to its convention was pursuant to a reasonable regulation calculated to achieve a permissible, indeed laudable, end. The action of the Credentials Committee [in seating petitioners instead of respondents] was taken on the basis of a clear and constitutional rule. . . . Moreover, the rule had been announced—and understood—as applicable to the selection of delegates prior to the election process." (A.-54.)

E. Credentials Contests Should be Decided by the National Political Parties Themselves and Not By the Courts.

When this controversy came before the Court initially, this Court noted that "judicial intervention in this area has traditionally been approached with great caution and restraint." 409 U.S. at 4. Petitioners submit that the history of this litigation demonstrates the wisdom of a policy of judicial nonintervention into such controversies.

If the Illinois courts can intervene into credentials contests at National Political Party Conventions, then so can the courts of the 49 other States. In at least three contests (Mississippi, California and Illinois) Federal courts were asked to intervene immediately prior to the 1972 Democratic National Convention. Even if cases are brought in state courts and plaintiffs (like respondents in this case) purport to frame their complaints on grounds of state law,

Federal constitutional issues will continually arise in defense of such actions. Given the stakes involved in such controversies (as evidenced by this Court's decision to come into special session to decide the California and Chicago cases in 1972), such contests must inevitably come to this Court for final resolution.

The Court of Appeals in *Irish* v. *Democratic-Farmer-Labor-Party of Minnesota*, 399 F.2d 119 (8th Cir. 1968), noted that only in cases involving racial discrimination have courts generally been willing to interfere in the internal operations of political parties:

> "The courts, generally and consistently, have been reluctant to interfere with the internal operations of a political party. Lynch v. Torquato, 343 F.2d 370 (3 Cir. 1965); Democratic-Farmer-Labor State Central Committee v. Holm, 227 Minn. 523, 3 N.W.2d 831, 833 (1948). In our opinion this attitude of non-interference is an appropriate starting point. We recognize, however, that the Supreme Court and other tribunals, in cases having racial factors, have in fact, on constitutional principles, thwarted invidious discrimination in party primaries and in other political maneuvers. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), are examples of this. There is nothing here, however, with racial overtones or anything akin thereto." 399 F.2d at 120.

Similarly, this Court, in its decision to allow the National Convention to decide the Chicago and California contests in 1972, noted the absence of claims of racial discrimination as a basis for judicial intervention:

> "This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary election within a single state. Cf.

> Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944)." 409 U.S. at 4.

Indeed, in the instant case it is *petitioners* who alleged racial discrimination by respondents in their pre-primary slating activities and the Democratic Party's Hearing Examiner found respondents had so discriminated "invidiously and substantially." (A.-38.) It is the right of the National Democratic Party to enforce rules *against* such racial discrimination, among other things, which is now at stake. Petitioners and the National Democratic Party were acting to uphold the very constitutional principles which this Court established in *Smith* v. *Allwright, supra,* and *Terry* v. *Adams, supra.*

In rejecting the request for judicial interference into political party affairs in *Irish* v. *Democratic-Farmer-Labor Party,* 399 F.2d 119 (8th Cir. 1968), the Eighth Circuit also noted that "the issues raised by the plaintiffs-appellants are the subject of a formal challenge lodged within the time allowed by the party rule with the Credentials Committee of the Democratic National Committee." 399 F.2d at 121. Cf. *Smith* v. *State Executive Committee of Dem. Party of Georgia,* 288 F. Supp. 371 (N.D. Ga. 1968) (noting the existence of "obvious political and legislative remedies"). Similarly, this Court in denying judicial relief to respondents and the California plaintiffs prior to the 1972 Convention noted that its action "will not foreclose the Convention's giving the respective litigants in both cases [Chicago and California] the relief they sought in federal courts." 409 U.S. at 3. See also *Riddell* v. *National Democratic Party,* 344 F.Supp. 908 (S.D. Miss. 1972) (appeal pending, 72-2437, 5th Cir.), in which the court denied

injunctive relief but advised the National Democratic Party to give a full hearing to both contesting delegations before its Credentials Committee. The availability of other avenues of relief to those who seek to involve the courts in credentials controversies has been emphasized by commentators. See, *e.g.,* Note, "Constitutional Law— Justiciability—Credentials Disputes", 1973 Wis.L.Rev. 1191, 1202.

Every student of National Political Conventions has emphasized the intangible and delicate factors and relationships which go into Convention decision-making:

> "[T]his one occasion for national operation accentuates or reveals the tensions of ambition and the competitiveness of faction. The most savage struggles can ensue, the most violent passions unleased. Nor is the unity of interest and objective complete in a national convention. Motives and specific objectives vary among the thousands of men and women who take part. Ramifications multiply as the geographical area of party organization widens." Goodman, *supra,* at 213.

A range of complicated and often subjective factors has historically gone into the decisions on credentials contests. Courts are incapable of considering the intangibles of such political bargaining. Often the balancing of competing factors has led the National Conventions to compromise contests by splitting or reconstituting delegations in various ways (see pp. 54-67, *supra*). The political process involved may actually extend over a period of years—with decisions at one Convention generating commitments which are relevant in later years and so on. See generally Mayer, *The Republican Party 1854-1966* (1967); Goldman, *The Democratic Party in American Politics* (1966). This kind of political

process—attuned to a National Political Party's own evolving principles and interests—is abrogated if the resolution of such controversies is vested in the courts.

Moreover, by their nature, credentials contests do not arise until the period immediately prior to the National Political Party Convention. At that time the political struggle over the Presidential nomination is intense. If such contests are justiciable, then the lower courts—and ultimately this Court—are put in the posture of determining, or at a minimum affecting in a direct and immediate way, who the Presidential nominees will be. Any interference in the process by judicial action—even any delay in determining whether there will be judicial action—has acute political consequences. As Mr. Justice Harlan wrote:

> ". . . timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 163 (1968) (concurring opinion).

To render such contests the subject of judicial determination is to involve the courts in matters which they are ill-equipped to decide, as to which no "judicially manageable standards" are available, and under circumstances which inevitably embroil the courts in intense and immediate political controversies.

Petitioners submit such political contests are a matter which the citizens associating together in a National Political Party should be allowed to decide for themselves.

III.

PETITIONERS' RIGHT TO A FAIR HEARING AS GUARANTEED BY THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS DENIED IN VIEW OF THE PUBLIC STATEMENTS CONCERNING THIS CASE MADE BY THE TRIAL JUDGE WHILE THE INSTANT CASE WAS PENDING BEFORE SAID TRIAL JUDGE, WHICH STATEMENTS DEMONSTRATED A GROSS BIAS AND PREJUDICE AGAINST PETITIONERS.

The trial judge below publicly advised respondents to enforce his injunctive orders in a Florida state court and compared the situation to Nazi Germany. The comments are quoted at pages 18-19, *supra.*

The Illinois Appellate Court, basing its decision upon (1) a party's right to only one change of venue under the Illinois Venue Act and (2) the fact that the trial judge made his statements only after issuing his original order, refused to vacate the trial court's orders on this ground. (A.-151.) However, the relief sought was not grounded upon any statutory right to a change of venue but upon the constitutional guarantee of a trial before "an unbiased judge." This right is essential to due process. *Holt* v. *Virginia,* 381 U.S. 131, 136 (1964). *Cf. Irwin* v. *Dowd,* 366 U.S. 717, 722 (1961); *Tumey* v. *Ohio,* 273 U.S. 510, 522 (1926). It is axiomatic that "trial before 'an unbiased judge' is essential to due process." *Johnson* v. *Mississippi,* 403 U.S. 212, 216 (1971). The fact that the trial judge's statements were made after his original order was issued does not alter the demonstration of bias they represent. Further, the statements were made prior to the trial judge's supplemental order of August 2, 1972.

This Court's previous decisions have held that petitioners had a right to a hearing before an impartial judge, which they did not receive. The judgment should be reversed, if for no other reason, because of extreme bias manifested toward petitioners by the trial judge.

IV.

THIS CASE DOES NOT PRESENT "MOOT AND ABSTRACT" QUESTIONS.

Respondents contend for the first time in their Brief in Opposition to the Petition for Certiorari, pages 15-17, that the issues presented in the instant case are "moot and abstract." * This view is erroneous for at least three substantial reasons.

1. For almost two years since the 1972 Democratic National Convention, respondents, publicly and in court, have pursued petitioners for alleged contempt of the July 8, 1972 order of the Circuit Court of Cook County appealed

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* In pleadings filed in the Court of Appeals for the District of Columbia on January 23, 1973, respondents themselves stated that this case is not moot:

> "The case on appeal [in the Illinois Appellate Court] appears to present a 'live' controversy in view of the supplemental injunction which pertains to present representation of Illinois in the Democratic National Committee." Suggestion of Keane, et al. that the Instant Cause Be Dismissed in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir., January 23, 1973) p. 4.

Moreover, respondents never argued in the Illinois Appellate Court that the instant case presented "moot and abstract" questions, nor, of course, did the Illinois Appellate Court consider the case to present such questions.

from herein. The trial judge, after issuing rules to show cause against 62 of petitioners, has deferred criminal contempt trials (which the judge has stated may be lengthy and in which petitioners are threatened with jail sentences), conditioned upon rapid prosecution by petitioners of this appeal. Thus petitioners clearly have a "substantial stake" in the validity of the initial order appealed from and petitioners are threatened with severe "disabilities or burdens" if the judgment below is not reversed. *Cf. Carafas* v. *LaVallee*, 391 U.S. 234, 237-8 (1968); *Ginsberg* v. *New York*, 390 U.S. 629, 633 (1968).

As noted, the trial judge has deferred the contempt trials pending disposition of the proceedings in this Court. There is no basis for the suggestion of respondents that the trial judge might go forward with contempt proceedings even if his orders are reversed by this Court. The Circuit Court of Cook County was patently without jurisdiction or power to dictate which contesting delegation should be seated in the Democratic National Convention. Moreover, there is no logic or precedent to support the suggestion that petitioners might be punished for disobeying a patently invalid order under circumstances where the effect of the order, if obeyed, would have been irrevocably to deprive the National Democratic Party of its right to decide the Chicago contest and irrevocably to deny petitioners their right to participate in the Convention in accordance with the Convention's decision. Further, this Court (as well as the Court of Appeals for the District of Columbia) had decided the issues in the case in the Federal court action instituted by respondents. The subsequent contrary order of the Circuit Court of Cook County was, as counsel for the Democratic National Committee stated in post-convention pleadings filed in the Court of Appeals, "transparently in-

valid" in light of those prior decisions.* For these reasons alone, therefore, cases such as *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), which indicate that, under some circumstances not present here, an unconstitutional order of a state court must nevertheless be obeyed, have no applicability.

2. The Circuit Court's supplemental order of August 2, 1972, affirmed by the Illinois Appellate Court, bars petitioners from participating in the selection of members of the Democratic National Committee to serve until 1976, despite the fact that the Rules of the National Democratic Party provide that the delegates seated at the 1972 Convention are entitled to choose the National Committee members. The persons chosen by the August 5, 1972 caucus in which respondents participated (as a result of the Circuit Court's supplemental order) have served in the National Committee during the interim period, pending prosecution (at such time as the Circuit Court's order should be vacated) of the challenge filed by petitioners with Democratic National Committee.

3. The holding of the Illinois Appellate Court that a National Political Party Convention is "without power or authority" to deny seats to persons chosen as delegates in accordance with state law (A.-149) and that persons so chosen have "a legal right [to be seated] properly protected by the courts" (A.-144), notwithstanding contrary rules and decisions of the National Political Party, presents a critical question of continuing public importance for the functioning of the American political party system. It is difficult to exaggerate the significance of that decision, if valid, for the functioning of American political parties and their national presidential nominating conventions. The instant case therefore raises a recurring question of fundamental importance which warrants a decision on the merits by this Court *even if* the judgment below did not have the continuing, critical consequences for petitioners discussed above. Cf. *Storer* v. *Brown*, 94 S.Ct. 1274, 1282, n.8 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 (1972); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

* Counsel for the National Democratic Party also stated:
"At every stage of this litigation, the National Democratic Party has taken the position that under the Constitution no courts—state or federal—may interfere in the internal affairs of a national political party, except possibly in exceptional circumstances not present in this case. That position was adopted, on at least a preliminary basis, by the Supreme Court in its ruling in this case." Response of Joseph A. Califano, Jr., et al., Counsel for National Democratic Party and Democratic National Committee in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. November 27, 1972 at p. 1).

CONCLUSION

For the reasons set forth herein, petitioners respectfully pray that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSINS, ET AL.,
Petitioners,

vs.

PAUL T. WIGODA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

BRIEF FOR RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSINS, ET AL.,
Petitioners,

vs.

PAUL T. WIGODA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

BRIEF FOR RESPONDENTS.

This brief is respectfully submitted on behalf of respondent, Paul T. Wigoda, plaintiff-appellee below, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated, in answer to the brief herein filed by William Cousins, et al., petitioners.

QUESTIONS PRESENTED.

1. Does the State of Illinois have a sufficiently compelling interest in preserving the integrity of the free and open primary election required by its statutes to warrant an injunction preventing Illinois citizens from acting as delegates to a national convention representing particular Illinois congressional districts

when they were not elected to such offices and, if by so acting, they restrict the constitutional rights of voters and candidates in said election?

2. Is the convention subject to no law other than its own or is it an assembly affected with a public interest and constitutional obligations as affording the only practical means by which citizens can participate in selecting candidates for high office?

3. Does the history of national political conventions provide any precedent for preventing the courts of Illinois from ordering Illinois citizens not to attend a national convention as delegates representing the State when State law requires that candidates for delegate be popularly elected?

4. Does a national political convention have any right or authority to grant an Illinois citizen immunity from obedience to the State's election laws?

5. Is the right of Illinois voters to associate in a political party and participate in its national convention through freely elected delegates sufficiently important to warrant a restraint on the right of other citizens not elected as delegates to represent voters who did not choose them?

6. Is a litigant who has obtained a judgment in a federal Court of Appeals permitting him to pursue his remedies in a state court bound by a later judgment (itself stayed by this Court and thereafter vacated) issued by another federal Court of Appeals in proceedings to which he was not a party and in which the issues raised in the first court were expressly not decided by the second?

7. Did alleged remarks of a trial judge (later explained by him) which comment on the evidence but which were made after hearing and judgment deprive petitioners of an unbiased judge?

COUNTERSTATEMENT OF THE CASE.

Petitioners' statement of the case nowhere relates the facts upon which the injunctions which led to the opinion of the Illinois Appellate Court are based. This counterstatement is therefore necessary.

The Plaintiff Class.

Plaintiff-respondent, Wigoda, is a citizen and resident of the State of Illinois. He is a registered voter of the 9th Congressional District in which he resides. Wigoda was duly elected a delegate to the 1972 Democratic Party national nominating Convention (hereinafter "the Convention") in accordance with the provisions of the Illinois Election Code (hereinafter "the Code"). (A. 85.)

Wigoda is the representative of the class of persons residing in the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois (all of which comprise the City of Chicago), who were duly elected as "uncommitted" delegates and alternates to the Convention in a primary election conducted by the State of Illinois in accordance with the provisions of the Code. Wigoda and the class thus described are hereinafter collectively referred to as "the delegates". The delegates are persons of white, black and Latin American extraction and include adult males and females of all ages. (A. 85-86.)

The Election of the Delegates.

The election of delegates representing the Illinois electorate to national nominating conventions of the political parties is provided for and controlled by the statutes of the State of Illinois, to-wit, §§ 7-14 and 14.1 of the Code (Ill. Rev. Stat., ch. 46, §§ 7-14 and 7-14.1) and other sections hereinafter cited. Section 7-1 of the Code provides that the election of delegates and alternates "to national nominating conventions . . . shall be

made in the manner provided in this Article 7 and not otherwise." (A. 86.)

On or before January 19, 1972, the candidates for delegate filed nominating petitions signed by at least one-half of one percent (approximately 300 persons) of the qualified primary electors of the Democratic Party residing in their respective congressional districts.* These petitions were completed in accordance with the provisions of Section 7-10 of the

* Illinois congressional districts had recently been reapportioned pursuant to a plan approved by a three-judge federal court. *Skolnick* v. *State Electoral Board of Illinois*, 336 F. Supp. 839 (N. D. Ill. 1971). The districts from which the candidates ran thus complied with the principle of "one-man one-vote" and were free of invidious discrimination. The so-called Guidelines of the Democratic Party mandated elections of delegates from such districts:

> **"B-6 Adequate representation of minority views on presidential candidates at each stage in the delegate selection process** * * * the Commission urges each State Party to adopt procedures which will provide fair representation of minority views on presidential candidates and recommends that the 1972 Convention adopt a rule requiring State Parties to provide for the representation of minority views to the highest level of the nominating process.
>
> "The Commission believes that there are at least two different methods by which a State Party can provide for such representation. . . . *Second, it can choose* delegates from fairly apportioned districts no larger *than congressional districts.*
>
> "C-5 Committee selection processes * * * the Commission requires State Parties to limit the National Convention delegation chosen by committee procedures to not more than 10 percent of the total number of delegates and alternates. * * *
>
> "*When State law controls,* the Commission recommends that State Parties make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose." (Emphasis added.)

The Code prescribed an election for delegates in Illinois in accord with B-6 and C-5. This apportionment method was introduced in and enacted by the Illinois legislature at the instance of the Illinois Democratic Party to bring the Code into conformity with the spirit and letter of the so-called Guidelines. (A. 29). A pre-election analysis of the potential effect of this selection system on the not yet elected Illinois delegation is found in Wall Street Journal, 3-14-72, p. 1, col. 1.

Code (Ill. Rev. Stat., ch. 46, §§ 7-10) and filed in accordance with Section 7-12 of the Code. (A. 86.)

Petitioners, each of whom are citizens of the State of Illinois, made no challenge to such petitions nor were such petitions nullified or stricken by the electoral boards of the City of Chicago or the County of Cook. The candidates for delegates were thereafter certified by the State Electoral Board in accordance with Section 7-14 of the Code and their names properly placed on the ballots, with those of other candidates, for the primary election of March 21, 1972. (A. 86.)

Candidates for delegate were placed on the ballot by congressional district. There were 180 candidates for 62 delegate seats. (A. 87.) The candidate's ballot position was, pursuant to *Weisberg* v. *Powell*, 417 F. 2d 388 (7th Cir. 1969), determined by a lottery method. In addition to the candidate's name, the presidential candidate whom he supported was placed in parentheses on the ballot immediately adjacent to his name. If a candidate was uncommitted to any particular presidential candidate, this, too, was shown.*

On March 21, 1972, the Illinois primary was held. Pursuant to order of a three-judge court in *Pontikes* v. *Kusper*, 345 F. Supp. 1104 (N. D. Ill. 1972), *aff'd.*, 414 U. S. 51 (1973), any qualified Illinois voter could vote in the primary for candidates of the Democratic Party. More than 700,000 voters participated in the Democratic Party primary for delegates in the congressional districts herein involved. (A. 138.) The delegates were duly elected by a majority of the qualified electors of the Democratic Party voting in their respective congressional districts in accordance with Sections 7-46 through 7-51 of the Code. The results of the election were canvassed, certified and reported as required by Sections 7-53 through 7-58 of the Code. (A. 86.)

Section 7-63 of the Code provides a procedure by which the results of a primary election of a political party may be con-

* Appendix A hereto shows candidate placement on the ballot by congressional district together with votes received in the election.

tested. The objecting party must file with the Clerk of the Circuit Court of Cook County a petition in writing setting forth the grounds of contest within ten days after the completion of the canvass of the returns in such election by the Canvassing Board. Petitioners at no time availed themselves of said procedure or of any other lawful procedure for the challenging of elections under Illinois law.* (A. 87.)

On April 18, 1972, the Secretary of State of the State of Illinois, pursuant to Section 7-58 of the Code, issued his proclamation announcing the election of the delegates. (A. 87.)

No election for delegates to the Convention was conducted under the Code other than that at which the delegates were elected. (A. 87.)

The Commencement of This Action.

Prior to the issuance of the proclamation by the Secretary of State announcing the election of the delegates, certain of the petitioners**, although they had neither sought election as delegates nor attempted to use the challenge procedure provided by the Code, sought to challenge the credentials of the delegates before the Democratic National Committee on the grounds that party Guidelines had been violated in the election procedure. They filed a "challenge" which was transmitted to the delegates. (A. 4-5.)

This action was commenced by Wigoda, individually and as representative of a class, against the challengers in the Circuit Court of Cook County on April 19, 1972, the day following the proclamation of election, the first date upon which it could be said that the delegates were duly and officially elected. (A. 1-7,

* There were no challenges made by petitioners or *any other persons* to the delegates or to any candidate for delegate at any stage of the election proceedings.

** Cousins, Crowley, Hillman, Jackson, Kennedy, Langford, Raby, Singer and Velasquez. (This group, when differentiated from all petitioners, is hereinafter referred to as the "challengers.")

123.) Wigoda sought a declaration that the delegates had been elected in accordance with the Code and an injunction against harassment of the delegates in the performance of their duly elected offices. (A. 5-6.) Wigoda, with his complaint, filed and served upon the challengers a motion for preliminary injunction, which motion was set for hearing on Friday, April 21. (A. 124.)

The Removal.

During the late afternoon of April 20, challengers filed a petition removing this cause to the United States District Court for the Northern District of Illinois, where it was assigned to Judge Hubert Will. (A. 124.)

On Monday, April 24, Wigoda filed a motion to remand to the Circuit Court of Cook County on the ground that removal was improper. On May 18, Judge Will granted the said motion and rendered an opinion finding no grounds for federal jurisdiction. The court granted a ten-day stay of its remand order to enable an appeal therefrom. The Court of Appeals for the Seventh Circuit subsequently denied further stays on the ground that there was no basis in reason or authority for the removal and, on June 30, dismissed challengers' appeal without oral arguments or the necessity of Wigoda filing a brief in opposition to that of challengers. (A. 124.)

The *only* issue before the District Court on the removal was that of federal jurisdiction. The briefs of both sides were directed *solely* to that issue and in no way to the merits of the controversy. Nevertheless, the District Court gratuitously commented upon the merits, as reprinted at page 15 of petitioners' brief, and continued, . . . "it is difficult to imagine any thoughtful court granting the type of relief requested in the instant case." (A. 16.)

The Court of Appeals for the Seventh Circuit in affirming the remand order per curiam specifically stated, *"We express no*

opinion as to the effect of state law on the determination of proper delegates to the Convention. *

The Challengers' Suit for Injunction.

While this cause was pending before Judge Will, and while his opinion on remand was awaited, challengers commenced another action in the Northern District of Illinois seeking an injunction against the prosecution by Wigoda in the state court of the case at bar. Said lawsuit, entitled *Cousins, et al.* v. *Wigoda,* No. 72 C 1108, sought injunctive relief against Wigoda allegedly for seeking to violate or abridge challengers' First Amendment rights. The challengers' action was ultimately assigned to Judge Frank McGarr. (A. 125.)

Upon the expiration of the stay orders issued by Judge Will, which, under ordinary circumstances, would have permitted the Circuit Court of Cook County to proceed with the instant case, challengers sought injunctive relief from Judge McGarr. Despite Judge Will's finding that no jurisdiction existed in the federal court and his order remanding this cause to the state court, Judge McGarr issued a series of non-reviewable temporary restraining orders preventing Wigoda from proceeding in the state court. Finally, on June 9, Judge McGarr conducted a trial. Evidence was presented. At the conclusion thereof, a preliminary injunction issued against Wigoda barring him from proceeding with the state court action. This order was promptly appealed. (A. 125.)

After a short delay for the submission of briefs, the Court of Appeals for the Seventh Circuit, on June 29, held an expedited hearing. Acting peremptorily from the bench after oral argument, the Court of Appeals reversed Judge McGarr's injunction per curiam, stating, *inter alia* (*Cousins* v. *Wigoda,* 463 F. 2d 603, 606, 607, 608, 1972):

> "There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the

* The unpublished order is reprinted in Appendix B hereto.

> controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not yet disputed those allegations, but retains the right to do so. Moreover, assuming vacancies in the slate of delegates may occur, by death, resignation, or by the successful prosecution of one or more challenges before the Credentials Committee of the National Convention, Illinois law may control, or may affect, the manner of selecting substitutes or alternates. Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues. (Footnotes omitted.)
>
> • • • • •
>
> "We recognize that the time available for appellate review of any order which may be entered by an Illinois chancellor is now extremely limited, since the Convention will soon convene. More time would have been available if Cousins, et al., had mounted their attack before the Illinois election was held in March, or if they had met the state complaint when it was filed on April 18, 1972. The delay in the proceedings since that date cannot be charged to Wigoda, et al.
>
> • • • • •
>
> "The partial stay of the state proceedings cannot be supported by mere speculation that an Illinois chancellor might commit flagrant error. The principles of comity and federalism which the Supreme Court has repeatedly emphasized demand a higher respect for the state judiciary."

The Court of Appeals denied a motion to stay its order and further directed from the bench that its mandate issue forthwith to enable the state court action to proceed without further delay. (A. 125.)

The challengers then sought a stay of the Court of Appeals order from this Court. Hearings were held on the application to stay on Saturday afternoon, July 1, before Mr. Justice Rehnquist. (A. 125.) Late that afternoon, Justice Rehnquist issued his opinion (409 U. S. 1201) denying the challengers' application for stay, stating, *inter alia,* in 409 U. S. at p. 1206:

> "The opinion issued by the Court of Appeals majority specifically alluded to petitioners' [the challengers'] failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to petitioners for this purpose."

Thus, on Saturday, July 1, nine days before the Convention opened, it appeared that the instant suit could finally be heard by the state court.

However, a subsequent injunction by the Court of Appeals for the District of Columbia caused further delay. "To cast full and proper perspective" on this injunction, reference must be made to the so-called "credentials hearings." *Wigoda* v. *Cousins*, 14 Ill. App. 3d 460, 302 N. E. 2d 614, 619 (1973). (A. 126.)

The Credentials Hearings.

While this case was pending on the motion to remand, a hearing was held by a hearing officer designated by the Democratic National Committee to determine the propriety of the charges made in the challenge filed by the challengers against the delegates. (A. 126.) Numerous objections were raised to this hearing and to the proceedings therein. The hearing officer refused to consider questions of law concerning the legality of the Guidelines (A. 127) and, in other respects, allegedly violated due process rights of the delegates. (A. 138-139.) Nevertheless, the hearing officer issued a report finding that the 59 duly elected delegates had not been elected in accordance with the Guidelines. The hearing officer made no finding of wrongdoing by any individual delegate. Subsequently his report was presented to the Credentials Committee of the Convention, a political body, which, without considering due process objections or other legal issues raised, voted on June 30 to sustain the report and to recommend that the delegates not be seated, but that an alternative delegation (composed of petitioners here) be seated

to represent the subject congressional districts at the Convention. (A. 127.)*

The Keane Litigation.

The credentials hearings, on the complaint to exclude the delegates, were based upon the so-called Guidelines.

Thus, a member of the plaintiff class (Thomas E. Keane) commenced an action in the United States District Court for the District of Columbia (hereinafter "DCDC") to determine whether the Guidelines met constitutional standards. Said action, entitled *Keane, et al.* v. *National Democratic Party, et al.*, was not directed against petitioners but against the National Democratic Party and Democratic National Committee. (A. 127.)

The *Keane* action first came on for hearing in the DCDC on June 20. At that time, the challengers, who had not been

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* The hearing officer's report, though offered by the petitioners, was not received in evidence in any evidentiary hearing held in the instant case (T. 8/1/72, p. 322) nor have petitioners claimed, at any stage of review, that rejection of the said report by the trial court was error. It nevertheless appears in the Appendix as an exhibit to a rejected motion to dismiss and for summary judgment.

The hearing examiner found, *inter alia*, that discrimination had occurred against minorities in the placing of the delegates on the ballot. (A. 38). The peculiarity of this finding is underscored when one considers that among the Blacks elected as delegates were the President Pro-Tem (and majority leader) of the Illinois state senate (the then highest ranking Black state official in the United States), two congressmen, a Cook County commissioner, the President Pro-Tem of the Chicago City Council and other local and party officials who had attained their offices in various prior elections. Twenty-three of the 59 delegates are classified as "minority" representatives by the Guidelines. (A. 37, 139).

Wigoda's objections to the hearing examiner's report, which objections were perfunctorily rejected, are reprinted as Appendix C hereto. In view of the circumstances, the Illinois Appellate Court found that the conclusion of "actual discrimination" by the hearing officer "demonstrates deliberate distortion of the facts." 302 N. E. 2d at p. 626. (A. 139)

In any event, the informal "credentials hearings" were, in no way, a substitute for judical proceedings. See *Alexander* v. *Gardner-Denver Co.*, ... U. S ...., 39 L. Ed. 2d 147, 163 (1974).

named as parties therein, sought and were given leave to intervene. (A. 128.)

The DCDC held three of the four Guidelines challenged in *Keane* to be unconstitutional. On immediate appeal to the Court of Appeals for the District of Columbia (hereinafter "CADC"), the case was held to be premature because the Credentials Committee had not yet ruled on the challenge. (A. 128.)

Subsequently, on June 30, the Credentials Committee, as stated above, reported that the challengers should represent the delegates' congressional districts. (A. 128.)

On Monday, July 3, following the Credentials Committee ruling and Justice Rehnquist's order denying the challengers' application for stay of the judgment of the Court of Appeals of the Seventh Circuit which judgment permitted the state court to proceed, the DCDC again held hearings in the *Keane* case. No evidence was presented. Only arguments on the law pertaining to the constitutionality of the Guidelines were heard. The DCDC again found three of the four Guidelines involved to be unconstitutional, but found the fourth constitutionally sufficient. (A. 128.)

The Democratic National Committee, by counterclaim, sought an injunction from the DCDC against further proceedings by Wigoda in the instant state court action. The motion for injunction was denied. It was the DCDC's opinion that it should not prevent an Illinois state court from considering the delegates' complaint concerning the legality of petitioners' slate. (A. 57.)

Appeals were immediately taken by Keane and the Democratic National Committee to the CADC which held oral argument on July 4. On July 5, the CADC affirmed the DCDC as to the constitutionality of the single Guideline which the DCDC had upheld (Rule C6) and, in addition, issued its injunction to effectuate its judgment and prevent the delegates from proceeding with the instant case in the state court. *Keane* v. *National Democratic Party*, 469 F. 2d 563 (D. C. Cir., 1972). (A. 51-61.)

The CADC stated, *inter alia*:*

> "No violation of Illinois law is at issue here." 469 F. 2d at 572. (A. 54.)
>
> * * * * *
>
> "Judge Hart based his denial of the counterclaim on the grounds that the question of the legality of the slate certified by the Credentials Committee in lieu of the plaintiffs was not before him, and that there was no justiciable issue presented in this action concerning the eligibility of the members of that slate to represent the Illinois districts in question.
>
> "In so ruling Judge Hart seems to have focused solely on the state law claims which apparently are the basis of the state proceeding, and which were not before the District Court here." 469 F. 2d at 573. (A. 57.)

The CADC stayed its mandate for approximately twenty-four hours to enable the delegates to apply to this Court for a further stay on the condition that the delegates take no action inconsistent with the CADC opinion pending such application, i.e., that they not proceed with the Illinois action.

Keane promptly applied for such a stay and, on the morning of July 6th, filed a Petition for Writ of Certiorari.

On Friday evening, July 7th, this Court "stayed the judgment" of the CADC. The Court stated (409 U. S. 1 at pp. 3, 6):

> "The Court concludes it cannot in this limited time give to these issues the consideration warranted for final decision on the merits; we therefore take no action on the petition for certiorari at this time.
>
> * * * * *
>
> ". . . While the Court is unwilling to undertake final resolution of the important constitutional questions pre-

* The opinion of the CADC was in three separately captioned parts. The first considered the California challenge; the second the Illinois challenge and the third "The Illinois Counter-Claim," i.e., the appeal from the denial of injunctive relief against prosecution of the instant Illinois action.

sented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals [the CADC].

* * * * *

"The applications for stays of the judgments of the Court of Appeals [the CADC] are granted."*

Trial of the Instant Action—July 8.

This Court rendered its opinion staying the judgment of the CADC on the evening of July 7. Notice was promptly given to petitioners** that the delegates would appear in the Circuit Court of Cook County on Saturday, July 8, for hearing on the complaint for injunction. (A. 129.)

This case thus finally came to trial on July 8, two days before the Convention opened. Petitioners, through their attorneys, moved for a change of venue from the Chief Judge of the Chancery Division of the Circuit Court basing their request on a Washington, D. C. newspaper article which stated that prior to being elected to the bench he had been a party official and legislative leader. The change of venue was granted and in the afternoon of July 8 the case came before the Honorable Daniel J. Covelli. An evidentiary hearing was held. (A. 84-85, 129.)

* After the Convention, this Court granted Keane's Petition for Writ of Certiorari, *vacated* the judgment of the CADC and remanded to the latter court to determine whether *Keane* was moot. 409 U. S. 816 (1973). The CADC held the case moot insofar as it related to Convention seating and affirmed the judgment of the DCDC which denied the injunction which would have prevented prosecution of the instant case. 475 F. 1287 (1973). The CADC has also denied various requests of the challengers for further injunctive relief against the proceedings in the state court and for a rule to show cause directed against Wigoda and others for allegedly violating the CADC's stayed and subsequently vacated injunction order by proceeding herein albeit after the stay was issued by this Court.

** By this time, all persons chosen by the challengers to replace the delegates had been made defendants herein. (A. 127.)

The court, at the conclusion of the hearing, found that on June 22nd and June 24th, 1972,* petitioners were selected as "alternative" delegates and alternates to the Convention in caucuses governed by rules of procedure established by the challengers and adopted by them without regard to the applicable requirements of the Code. (A. 87.)

Petitioners established themselves solely on the basis of their own authority to select delegates from the various Illinois congressional districts involved, without any legal justification or authority from any other people or the laws of the State of Illinois. (A. 88.)

In contrast, the delegates were elected in a free, equal, open and nondiscriminatory election held by the state pursuant to the Code in which, as stipulated by petitioners, anyone could run for office and any qualified person could vote. In said election, there were 180 candidates for 62 delegate seats. (A. 87.)

The court further found that on June 30, petitioners, by resolution of the Credentials Committee of the Democratic National Convention, were certified as delegates and alternates to the Convention in place of the delegates who were duly and properly elected under the Code. (A. 87.)

The court further found irreparable injury in that the delegates "have been deprived of a place of authority, prestige and position to which they were entitled by virtue of the votes of the persons participating in the primary election held pursuant to and in accord with the Illinois Election Code"; that "the duly qualified voters who caused [the delegates] to be elected have been deprived of their right to vote and to vote effectively"; that the "electoral process in the State of Illinois has been subverted, thwarted and nullified by the actions of [petitioners]"; and that the delegates "have been deprived of their rights, obtained pursuant to a lawful election, of participating with other party functionaries in the conduct of the Democratic National Convention

* This was even subsequent to the date permitted by the Guidelines for certification of delegates.

and from taking part in decisions to be made therein, all of which will be vital to the electorate in the State of Illinois who participated in the duly authorized election." (A. 88.)

As the Convention was scheduled to convene on Monday, July 10, 1972, the harm was found to be immediate and, unless an injunction issued, inevitably irreparable. (A. 88.)

The trial court's findings of fact were not objected to at the nisi prius level nor have they been questioned at any stage of appellate review.

Based upon its findings, the trial court ordered that each of the petitioners before the court, all of whom had submitted themselves to the court's jurisdiction and had formally appeared by counsel who were present throughout the hearing, be enjoined and restrained from acting or purporting to act as a delegate to the Convention from or on behalf of the particular Congressional Districts involved or from performing the functions of delegates from the said districts including but not limited to voting in the Convention or in official or duly designated committees thereof. (A. 89.)*

No immediate appeal was taken from this order nor was a stay thereof sought from a reviewing court or a judge thereof. (A. 130.)** Petitioners, however, participated in the Convention

* To guard against any violation of petitioners' First Amendment rights, the trial court deleted from the delegates' proposed decree the following paragraph (A. 89):

> [3. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from holding themselves out to be or representing themselves to be delegates lawfully representing the aforementioned Illinois Congressional districts.] [deleted]

** The case was tried before the Circuit Court of Cook County on July 8. A decree was entered that evening. More than 48 hours remained before the Convention was to convene. Procedures existed under Illinois law for expedited review which enabled one judge of a reviewing court to issue a stay. See S. H. A., Ch. 110A, § 302(b), 305(b). Although both the CADC and this Court had acted on

as delegates representing the various congressional districts. (A. 117, 130.)

The Post-Convention Hearing.

After the conclusion of the Convention, a party caucus of delegates was scheduled to be held in Chicago, Illinois, on August 5. (A. 116.) The delegates moved for supplemental relief. They sought to enjoin petitioners from participating therein and a declaration that they (the delegates) were the only persons authorized by the Code to do so. (A. 115.)

The trial court again held evidentiary hearings. The trial court "heard whatever evidence without limitation that the parties . . . deem fit and proper to present . . .". All parties did, in fact, participate in the hearing for supplemental relief. (A. 116.)

The evidence disclosed the manner in which petitioners were chosen to "represent" the electorate of various congressional districts.

Caucuses conducted by the challengers or persons designated by them were held in each of the congressional districts. The only persons entitled to vote therein for delegates to the Convention were those candidates for delegate who had been defeated for the office of delegate in the election held under the Code. All persons other than defeated candidates were excluded from voting. The defeated candidates were permitted to vote for delegates from the various congressional districts by weighted vote in accord with the vote total which they had received. The persons to be elected as the "alternative delegation" had to conform to various race, age and sex quotas. These rules of election were developed by the challengers themselves without authority from anyone. (A. 80-83.)

The evidence demonstrated the manner in which these rather peculiar election procedures worked. In the 1st Congressional

review in approximately the period of time intervening between the Circuit Court's decree and the Convention, petitioners neither appealed nor made application for a stay to an Illinois reviewing court.

District in which the challengers' meeting was held in a private home (T. 8/1/72, p. 217),* the caucus leader (apparently not a district resident [T. 8/1/72, p. 236]) announced that all of the persons to be chosen to represent the district had to be black or, at best, only one white could be chosen. (T. 8/1/72, p. 245). An Oriental in attendance asked whether he could be elected a delegate. He stated that there was no congressional district in which there were enough Orientals to justify, by quota, an Oriental delegate. The caucus leader advised him that he could not be chosen as a delegate from the 1st Congressional District because he was neither black nor white. (T. 8/1/72, p. 247.)**

The 7th Congressional District is composed of a substantial number of black voters. From this it was determined by the challengers that a certain percentage of the representatives of this district were to be black. A photograph taken at the challengers' caucus to elect delegates demonstrates that there were no black voters in attendance. Blacks were thus chosen solely by whites.

In the 8th Congressional District, although only four persons were permitted to vote for delegates, at least two ballots had to be taken because after the first vote was tallied, because the results did not comply with the race, age and sex quotas imposed by the challengers. (T. 8/1/72, pp. 275, 281, 282, 286.)

In the 9th Congressional District, three of the losers in the primary election were disqualified from participation in the challengers' electoral process because the challengers had determined that they might be representatives of the regular Cook County Democratic organization. (A. 80-81, T. 8/1/72, pp. 312-313.)

* The transcript of proceedings is herein referred to as "T." As the trancript is in various sections, the date and page of the particular hearing is set forth.

** Similarly, Latin Americans were also barred from participation. (T. 8/1/72, p. 245.)

In the 11th Congressional District, the challengers' coordinator, who was not a resident of the district, stated that the rules for choosing the alternative delegation were made by the challengers and excluded all but losing candidates from voting (A. 91): "There is no way for the Democratic primary voters themselves to now cast another ballot."* As he stated to residents of the district who had voted in the primary conducted under the Code but who were excluded from participation by the challengers' "process":

> "Under the rules which have been adopted [by the challengers] and filed with the Democratic National Committee, and which I have authority to interpret and conduct the meeting in accordance with, the rules provide that the votes are to be cast by the persons who ran on the March 21st ballot, received votes in that primary, and were defeated by what the challengers regard as illegal acts by the organization.
>
> "There is no basis for anybody else to cast a vote at this meeting." (A. 93.)

The coordinator confirmed the complete disenfranchisement of the individual electors when he was asked by one of the citizens of the 11th Congressional District:

> "In other words, you don't recognize the individual citizen that voted in the last primary. His vote actually didn't count, doesn't at all?
>
> "Mr. Schmidt (the coordinator): No." (A. 95.)

The coordinator then stated that only 15 persons were entitled to vote with "the intent that those 15 persons would make every effort to choose a delegation representative of this district." (A. 96.) In fact, only 6 persons appeared to choose the

* The challengers' rules under which petitioners were selected to represent Democratic voters thus appear to violate the order of the three-judge federal court in *Pontikes* v. *Kusper*, 345 F. Supp. 1104, which sought to maximize participation by the voters in the Democratic primary by invalidating Illinois' anti-raiding statute. See p. 5, *supra*.

delegation. Mr. Schmidt further stated that the rules were not approved by the National Democratic Party nor by the State of Illinois, but were adopted by the challengers "pursuant to authority which they assumed as the challengers to decide [on] a new Chicago delegation. . . ." (A. 97.)

The exclusion of the voters from petitioners' process is demonstrated by testimony (on adverse examination by respondents' counsel) of William Singer, a challenger and, later, co-chairman of petitioners' delegation (T. 8/1/72, p. 322):

> ". . . Those persons [the losers in the Code election] who received votes who were not tainted were allowed to vote as electors in direct proportion to the number of votes they received. Those persons who were tainted [the winners in the Code election], . . . were not allowed to participate in the meetings. Therefore, persons who cast ballots for those persons [the winners] were not counted in that procedure."

After hearing this and other evidence, the trial court found that after it had issued its injunction of July 8,

> "each of the [petitioners] . . . though not duly elected a delegate or alternate to the Democratic National Convention, in accordance with the provisions of the Illinois Election Code, acted or purported to act as a delegate or alternate to said Convention and sought to perform the functions of delegate or alternate including voting on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts." (A. 117.)

The court found that if the petitioners participated in the caucus to be held on August 5, 1972, the court's order of July 8 would be subverted and nullified. (A. 117.)

The trial court reiterated that it had found that the delegates were the only persons who were duly elected in accordance with and pursuant to the provisions of the Code to represent the various congressional districts.

The court further found:

> "2. The election at which the delegates . . . were elected was conducted pursuant to the Illinois Election Code and the Constitution of the State of Illinois and was free and equal and open to all qualified persons as candidates and voters without limitation.
>
> "3. The process by which defendants purported to become representatives of the people of the State of Illinois was secret, restrictive, discriminatory, without foundation in law and without regard or recognition to the individual citizens of the Congressional Districts . . . who voted in the election conducted pursuant to the Illinois Election Code." (A. 118.)

Thus, the court entered a supplemental injunction finding that the delegates were the only persons entitled to participate as delegates in the caucus on August 5, 1972, and restraining petitioners from performing the function of delegate therein. (A. 119-120.)

There has been no challenge, on review, to any of the facts found by the trial court at either of its hearings.

Appellate Review.

The Appellate Court of Illinois, on appeal, affirmed the orders of the trial court. 14 Ill. App. 3d 460, 302 N. E. 2d 614 (1973). (A. 121.) The Illinois Supreme Court denied leave to appeal.

SUMMARY OF ARGUMENT.

Respondents were elected delegates to the Convention in a free, equal, open election conducted pursuant to state statute in which 700,000 voters participated. The State has a vital interest in the preservation of its electoral processes. The rights of the state, and the constitutional rights of its citizens to vote and to effective candidacy are subject to protection by the state's courts. Here, the state court sought to vindicate the state's interest in Illinois citizens' fundamental civil and political rights

by enjoining Illinois citizens not elected under the election laws from serving as delegates representing specified Illinois congressional districts at the Convention in the place of persons validly elected. The state court's action was in all respects proper. It did not violate petitioners' "association rights" but recognized that "the right to vote" is superior to whatever rights petitioners might possess.

In enjoining petitioners, the state court acted in accord with a long line of decisions of this Court protecting and preserving the right to vote in both general and primary elections and recognizing the state's interests in the orderly political processes within the state.

Moreover, the action of the state court is solidly grounded in the decisions of courts of all of the states of the union which have recognized that political parties are subject to state regulation and control. All states have regulated political parties by statute to prevent party abuses and to insure that party organization is responsive to the people.

The so-called "national party" and the Convention do not possess rights superior to those of the states. They cannot give to the citizens of a state immunity from the laws of the state nor protect a state's citizens if they seek to violate state law or state court orders.

The national party and Convention are no more than a federation of the state parties. The Convention meets quadrennially for a specific purpose—to nominate a candidate for President of the United States. At this Convention, representatives of all of the states of the union seek to put forth the views of each state's party electorate at a national level. This they have a right to do.

Neither the Convention nor the so-called national party has, in the past, sought to disregard the law of the state insofar as selection of delegates is concerned. Prior Convention credentials contests do not support the principle that the Call of the Convention is supreme over selection processes mandated by statutes

in the various states for the selection of delegates to the Convention. Rather, history demonstrates a deference to state law and reaction by the states when abuses by the Convention sought in any way to seek to avoid the law of the states.

The state court was not barred from hearing the instant case nor were any findings or orders entered in any other court which might have had either a *res judicata* or collateral estoppel effect upon the state court.

Lastly, petitioners received a fair trial before an unbiased judge. The remarks of the trial judge, taken out of context by petitioners, were, in any event, made after the rendition of a decree. Assuming, *arguendo*, that the remarks were made in the form stated by petitioners (and they were not), they do not demonstrate bias but only a recognition by the court of what the evidence showed. This is demonstrated by the fact that a substantial number of petitioners specifically disassociated themselves from the motion for change of venue. (See Part V hereof.)

ARGUMENT.

I.

THE STATE OF ILLINOIS HAD A COMPELLING INTEREST IN PROTECTING THE INTEGRITY OF ITS ELECTORAL PROCESSES AND THE RIGHT OF ITS CITIZENS UNDER THE STATE AND FEDERAL CONSTITUTIONS TO EFFECTIVE SUFFRAGE.

The delegates were overwhelmingly elected to represent the Democratic Party electorate of certain Illinois congressional districts in an open, free and equal election in which more than 700,000 persons participated.* Petitioners, on the other hand, sought to represent the Democratic Party electorate of these districts on the basis of rules which certain petitioners had formulated providing for closed, restricted proceedings in which only some of the losers in the primary election were permitted to

* This figure does not include those voting on the Republican side.

participate. In such circumstances, it was the responsibility of the Illinois courts, upon proper application, to protect and preserve rights secured under the Code and the state and federal Constitutions. Thus, the orders which refused to permit petitioners "to frustrate the State's interest in maximizing" "citizen and candidate participation in the nomination process", 302 N. E. 2d at p. 629, (A. 146), were, in all respects, proper.

In upholding "the due process and equal protection rights", 302 N. E. 2d at p. 631, (A. 150) of the delegates and voters, the rationale of the Illinois courts was solidly imbedded in American political philosophy and legal precedent, both state and federal. Moreover, the Illinois courts by enjoining certain Illinois citizens from representing others at the Convention cast a proper perspective upon the station occupied by political parties in the American body politic.

The Founding Fathers recognized that "[a] fundamental principle of our representative democracy is, in Alexander Hamilton's words, 'that the people should choose whom they please to govern them.'" 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876) cited in *Powell* v. *McCormack*, 395 U. S. 486, 541, 547 (1969). As stated by James Madison:

> "As each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters." The Federalist, No. 10, 60 (Modern Library ed.).

The wisdom and expectations of the draftsmen of the Constitution have served as a foundation for continued expansion of popular suffrage. Thus, six of the last twelve Amendments to the Constitution have extended the elective franchise by restricting

limitations thereon and expanding the ambit of protected participation*.

This Court has eloquently stated the temper of the nation. The right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968); *Kramer* v. *Union School District*, 395 U. S. 621, 626 (1969); *Dunn* v. *Blumstein*, 405 U. S. 330 (1970).

> "[T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U. S. 533, 561-562.

Laws which deny, limit, dilute or discourage maximum participation by citizens in voting for candidates for public office have been consistently stricken. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *United States* v. *Classic*, 313 U. S. 299 (1941); *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *Baker* v. *Carr*, 369 U. S. 186 (1962); *Gray* v. *Sanders*, 372 U. S. 368 (1963). Moreover, it is recognized that the right to vote is by itself meaningless unless the voter can effectively cast a ballot for the candidate of his choice, *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Williams* v. *Rhodes*, 393 U. S. 23, 31, and be assured that his vote, once cast, will be counted. *Anderson* v. *United States*, ____ U. S. ____, 41 L. Ed. 2d 20, 33 (1974); *U. S.* v. *Mosley*, 238 U. S. 383, 386 (1915); *United States* v. *Classic*, 313 U. S. 299 (1941).

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* Amendment XV (race, color and previous condition of servitude), XVII (senatorial elections), XIX (women's suffrage), XXIII (District of Columbia), XXIV (abolition of poll tax), XXVI (18-year old vote).

"The right to vote freely for the candidate of one's choice is of the essence in a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U. S. 533, 555. "Obviously included in the right to choose . . . is the right of qualified voters within a state to cast their ballots and have them counted. . . ." *United States* v. *Classic*, 313 U. S. 299, 315 (1941). It is ". . . as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box." *U. S.* v. *Mosley*, 238 U. S. 383, 386 (1915). "Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his or her vote fairly counted, without its being distorted . . ." *Anderson* v. *United States*, ____ U. S. ____, 41 L. Ed. 2d 20, 33 (1974).

The right to effective candidacy for public and party office is an obvious corollary to the electorate's right to vote. *Hadnott* v. *Amos*, 394 U. S. 358, 364 (1969); *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Gonzales* v. *City of Senton*, 319 F. Supp. 189, 190 (S. D. Tex. 1970); *Stapleton* v. *City of Inkster*, 311 F. Supp. 1187, 1189-1190 (E. D. Mich., 1970). See also, Note, "Constitutional Safeguards in the Selection of Delegates to National Nominating Conventions", 78 Yale L. J. 1228, 1247-1249 (1970). To be guaranteed the full extent of the rights acknowledged by the courts in the franchise cases, persons must be granted the concomitant right to stand for office. "The effectiveness of the franchise can just as certainly be curtailed by restricting the group from whom candidates may be drawn as by restricting those entitled to cast a vote or by malapportioning a legislative body." *Stapleton* v. *City of Inkster*, 311 F. Supp. 1187, 1189-1190 (E. D. Mich., 1970).

The right of the delegates to stand for office is a right protected by the equal protection clause, *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Moore* v. *Ogilvie*, 394 U. S. 814 (1969). and by due process, *Williams* v. *Rhodes*, 393 U. S. 23, 41

(1968), (Harlan, concurring); *Briscoe* v. *Kusper*, 435 F. 2d 1046, 1053-1054 (7th Cir., 1970). To deny protection to the delegates is to eliminate both the opportunity and the incentive of the electorate for participation in the procedure by which the President is selected. See *Williams* v. *Rhodes*, 393 U. S. 23, 41 (concurring opinion, Harlan, *J.*).

Petitioners, in derogation of this bundle of voting rights stemming from pre-constitutional times, (see, e.g., *Powell* v. *McCormack*, 395 U. S. 486, 534 (1969) fn. 65, quoting from 16 Parl. Hist. Eng. 589-590 (1769)),* in effect, argue that the votes for the delegates should not be counted at all and, as a corollary, that the delegates should not have been permitted to run. Thus, the delegates and their constituency were to be excluded from a crucial phase of the electoral process and prevented from participating in the nomination of one of the two major contenders for the presidency of the United States.

In Illinois, as in other states, political parties by tradition and statute have become inextricably intertwined in the state's election process insofar as the selection of party officials, party candidates and presidential electors are concerned. Compare *Redfearn* v. *Delaware Republican State Committee*, 362 F. Supp. 65, 70 (D. Del. 1973). Participation in the party primary for the election of delegates to nominate the standard-bearer in the presidential election was the only effective means by which Illinois Democrats could participate in the selection of

* It was argued in Parliament in 1769 in behalf of John Wilkes in connection with proceedings for his expulsion:

> "That the right of the electors to be represented by men of their own choice was so essential for the preservation of all their rights, that it ought to be considered as one of the most sacred parts of our constitution. . . .

To the same effect is Locke, *Of Civil Government*:

> ". . . every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society, to submit to the determination of the majority, and to be concluded by it. . . ." (Reprinted in Goldwin, 1 Readings in World Politics 37, 2d ed. rev. 1953).

the presidential nominee. See *Nixon* v. *Condon*, 286 U. S. 73 (1932); *United States* v. *Classic*, 313 U. S. 299 (1941); *Rice* v. *Elmore*, 165 F. 2d 387, 389 (4th Cir., 1947). Protection of the right to vote effectively in political primaries, as well as in general elections, is a matter of constitutional concern. *Terry* v. *Adams*, 345 U. S. 461 (1953); *Smith* v. *Allwright*, 321 U. S. 649 (1944). See also, *O'Brien* v. *Brown*, 409 U. S. 1, 15-16 (1972) (dissenting opinion, Marshall, *J.*). As stated in *United States* v. *Classic*:

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact, the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected in Article I, § 2. And this right of participation is protected just as is the right to vote in the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." (313 U. S. at 318.)

Here, the primary for election of convention delegates in Illinois was not only "an integral part of the procedure of choice" but was the only means by which Illinois Democratic Party electors could select their representatives to the Convention. The State of Illinois, by statute, extended the principle of *Classic* to render presidential primaries as open, free and non-discriminatory as possible. Access to the party primary for a candidate requires a minimal number of petition signatures. No filing fees are assessed nor are there restrictions on the number of candidates for each convention seat or the designation by the candidate on the ballot of the presidential candidate whom he seeks to support. ". . . [P]rovisions were included in the Election Code to insure the due process rights of the participants in elections and the rights of voters would be preserved at all stages of the elective process". 302 N. E. 2d at p. 625. (A. 137-138.) Having adopted a meaningful primary system, the

State of Illinois has a vital and compelling interest, subject to protection by its courts, in preserving the integrity of that system against subversion or usurpation by its own citizens.

Constitutional responsibility for the conduct of elections generally rests with state governments. State laws set up election machinery and determine the qualifications for voting (subject to federal restrictions against limitations upon the suffrage and constitutional mandates for expansion thereof). Obviously, in such circumstance, there is a compelling state interest in the protection and promotion of the state's electoral processes. *Storer* v. *Brown*, ... U. S. ....., 39 L. Ed. 2d 714 (1974); *American Party of Texas* v. *White*, ... U. S. ....., 39 L. Ed. 2d 744 (1974); *Jenness* v. *Fortson*, 403 U. S. 431 (1971). ". . . [P]reservation of the integrity of the electoral process is a legitimate and valid state goal." *Rosario* v. *Rockefeller*, 410 U. S. 752, 761 (1973).

This thesis has consistently been reiterated by the present Court.

In *Storer* v. *Brown*, ... U. S. ....., 39 L. Ed. 2d 714, this Court considered a California primary election law which required, *inter alia*, that an independent candidate not have been affiliated with a political party for a year before the primary. Mr. Justice White, for the majority, stated:

> *"The direct party primary in California is not merely an exercise or warm-up for the general election, but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates.* The state's general policy is to have contending forces within the party employ the primary campaign and primary elections to settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit

> the names on the ballot of those who have won the primaries and those independents who have properly qualified." (39 L. Ed. 2d at 726.) (Emphasis added.)

The majority held that the one-year disaffiliation provision furthered California's interest in the ". . . stability of its political system" and that the state's interest outweighed the interests of the candidate or his supporters. So, too, Illinois' primary law, which enables all to participate, properly furthers "the stability of its political system" and outweighs the "right" of defeated candidates to disregard the election laws.

Similarly, in *American Party of Texas* v. *White*, ... U. S. ....., 39 L. Ed. 2d 744, Mr. Justice White, addressing the requirement of the Texas primary law, stated:

> "It is too plain for argument, and it is not contested here, that the state may limit each political party to one candidate for each office on the ballot and may insist that intra-party competition be settled before the general election by primary election or by party convention." (39 L. Ed. 2d at 760.)

Thus, this Court has expressly recognized the compelling interest of the state in requiring that intra-party rivalries be settled once and for all in a state-sponsored election and that once the people have spoken in the primary, the struggle for party nomination is concluded, not to be resumed in another forum.

Again, as Mr. Justice White stated in *American Party of Texas* v. *White:*

> "At least where, as here, the political parties had access to the entire electorate and an opportunity to commit voters on primary day, we see nothing invidious in disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot position for its candidates for the same offices." (39 L. Ed. 2d at 763.)

In this case, the State of Illinois, through its legislature, determined that an open primary, with easy access to all candidates and voters, was the proper method of settling intra-party disputes as to who would represent the party's electorate at the Convention. Illinois established election machinery at its expense, conducted the election and gave to the primary system all the protection and safeguards that are employed at general elections. The election was not a charade. Petitioners, like the petitioners in *American Party of Texas*, had access to the entire electorate of the Democratic Party and an untrammeled right to bring out the voters on primary day. Petitioners have never challenged either the openness or fairness of the primary nor do they contend that their right to stand for election was in any way abridged. The electorate and the delegates, however, attained rights under the election. Must then the state courts have stood by helplessly when petitioners, all Illinois citizens, ". . . by placing their hands on each other's heads, looking up at the sky and declaring, 'We are the delegates'**," usurped the offices for which they either had not run or had run for and lost?

Petitioners urge that the state court's injunctions constitute an infringement of their First Amendment right of association. However, the right of association is not totally uninhibited. "Neither the right to associate nor the right to participate in political activities is absolute in any event." *U. S. Civil Service Commission* v. *National Association of Letter Carriers*, 413 U. S. 548, 567 (1973). "Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or more serious injury, political, economic or moral." *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (concurring opinion, J. Brandeis). Restriction is particularly proper where it is necessary to protect the exercise of a more fundamental right—the right to vote. *Smith* v. *Allwright*, 321 U. S. 649 (1944). See also Raymar, "Judicial Review of

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** Royko, "A Hard Look at 'Singer 59'," *Chicago Daily News*, p. 3, July 5, 1972. A portion of this article is quoted in White, *The Making of a President 1972*, 219. The Royko article is reprinted in full in Appendix D hereto.

Credentials Contests: The Experience of the 1972 Democratic National Convention," 42 Geo. Wash. L. Rev. 1, 24 (1973).

Thus, the Democratic Party and the Jaybird Party yielded to the right of Negroes, a disenfranchised minority, to participate effectively in primary election systems. *Terry* v. *Adams*, 345 U. S. 464 (1953); *Smith* v. *Allwright*, 321 U. S. 649 (1944).* The states have for more than 80 years regulated, through a substantial body of legislation, both the structure and activities of political parties. To that extent, the laws have obviously imposed on party members' "right of association." (See Part II hereof.) Petitioners, in asserting that their "rights" supersede those of other Illinois residents to take part in the political process, view their "right of association" in an abstract social and political vacuum. But the coming together of 50 state political parties in a four or five day quadrennial meeting is not an abstract associational exercise. The Convention is a meeting with an express purpose, i.e., the nomination of candidates for President and Vice President of the United States. This "association" is not a private group meeting for discussion or promotion of political ideas; it is an integral step in the selection of the candidates for the highest public offices in the land.

The Democratic voters of Illinois had a right to participate in this process. The right to come together and "associate" in the

* In *Smith* v. *Allwright*, 321 U. S. 649 (1944), the Democratic Party was held by the Texas Supreme Court to be a "voluntary association" and hence free to establish its own criteria for membership. As stated by the Texas Supreme Court: "Without the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights,— that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the state convention of such party . . ." *Bell* v. *Hill*, 123 Texas 531, 534, 74 S. W. 2d 113. This Court, however, found that "other precedents of this Court forbid the abridgment of the right to vote" (321 U. S. 661) and that membership in the Democratic party was required for participation in the primary. The overriding concern of this Court was preservation of the right to vote which could not be inhibited by the rules of a private association acting in conjunction with the state established primary law.

Convention is not the exclusive right of the people who physically attend the convention; it is the right of the Democratic voters of Illinois to "associate" with other Democrats in that meeting through their elected representatives. It is this associational right which the delegates rightly asked the state court to protect.

Obviously, every Democratic voter in a given state cannot attend the Convention. Thus there must be a method for selecting delegates to enable rank and file Democrats to effectively participate in the nominating process. Illinois enacted a method which maximized the choice of representatives for the maximum number of Democratic electors. In that sense, Illinois' primary election was truly preservative of the right of Illinois Democrats to associate with Democrats of the other constituent state parties. As stated by Mr. Justice Stewart in *Kusper* v. *Pontikes*, 414 U. S. 51, 38 L. Ed. 2d 260, 267 (1973):

> "Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process. By preventing the appellee from participating at all in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice."*

In *Pontikes*, the right of association in the Democratic Party was denied only to those persons who had voted in the Republican primary within the previous twenty-three month period. In this case, the right to associate with other Democrats was denied to all those Democratic electors who voted for the "wrong" candidates.

* The primary election of 1972 (which gave rise to the above quoted statement), at which the delegates were elected, was held in conformance with the ruling of the three-judge court in *Pontikes* v. *Kusper* (345 F. Supp. 1104 [N. D. Ill. 1972]).

In nullifying the votes of 700,000 Democratic electors, petitioners abridged the right of those electors to associate with other Democrats and to participate with them in the selection of candidates for high office. "Such action is an absolute destruction of the democratic process . . . and cannot be tolerated." 302 N. E. 2d at p. 631. (A. 149.)

The State of Illinois established a concededly free and open primary as the method by which Illinois Democrats would settle intra-party disputes and participate thereby in presidential nominations. The State had an interest and a responsibility to protect the integrity of its elective political processes from total frustration at the hands of Illinois citizens whose goal was to render the votes of Illinois electors totally meaningless. *Jeness* v. *Fortson*, 403 U. S. 431 (1971); *Bullock* v. *Carter*, 405 U. S. 134, 145 (1972); *Storer* v. *Brown*, ... U. S. ....., 39 L. Ed. 2d 714 (1974).

The Circuit Court of Cook County preserved the integrity of the State's political processes with a minimum of restraint on other freedoms. The court ordered only that petitioners, as Illinois citizens, were required to abide by the laws of the state and could therefore not attend the Convention *as the representatives of the voters in the various Illinois congressional districts* when other persons had been elected. The trial court did not order the Convention or its constituent parties to seat the elected delegates. Nor did the trial court order petitioners to absent themselves from the Convention or forbid them from taking part in its deliberations in any other capacity. The court preserved the state's interests by forbidding the petitioners from ignoring or nullifying the results of a primary election, while at the same time minimizing the restraint, if any, on their associational freedoms. The state court did only that which it had the responsibility to do. It enforced Illinois law against the citizens of the State so that the political and civil rights of other citizens to vote freely for the candidates of their choice might be preserved.

II.

THE STATES HAVE LONG HAD THE POWER AND AUTHORITY TO PROVIDE FOR CITIZEN PARTICIPATION IN THE AFFAIRS OF POLITICAL PARTIES THROUGH REGULATED PRIMARY ELECTIONS FOR PARTY OFFICERS AND CANDIDATES.

The Illinois Appellate Court correctly held that, once elected, the delegates' rights to hold office were properly within the protection of the state court. 302 N. E. 2d at p. 628. (A. 144.) Petitioners urge that the foregoing "is without precedent" and "represents a drastic interference" with the rights of citizens to associate in a national party and establish therein standards and rules. (Pet. Br. 40.) However, in discussing the nature of the Convention, petitioners have ignored the nature of the Convention's constituency, i.e., the 50 state political parties, and the nature of the so-called "national party" itself. The significance of petitioners' omissions come into focus when the full scope and extent of state regulation of political parties is examined. The national convention is not, as petitioners urge, a supernational, monolithic body, but is rather a loose quadrennial federation whose member parties are as diverse as the States of the Union. (See Section III hereinafter.) Nor do the state delegations appear mysteriously at the Convention. Each is a representative of its state's party electorate, and arrives at the Convention as a result of a selection process which, in most states, is governed by state law.*

We thus examine the development of the regulatory systems in the several states to demonstrate: first, that the state interest described in Section I is, in fact, an integral facet of American

* State laws relating to the selection of delegates to national conventions are compiled under the direction of Francis R. Valeo, Secretary of the Senate, and printed by the U. S. Government Printing Office in Hupman and Thornton, Nomination and Election of the President and Vice President of the United States (Jan. 1972) and the May, 1972 Supplement thereto.

political life; second, that the rights of association which petitioners claim supersede state laws are, in fact, the subject of a substantial body of law developed in state legislatures and courts to meld the freedom to form parties with the electorate's right to participate fully in the selection of political candidates and party officers and, third, that the right of citizens to vote for party representatives in a primary is well established throughout the country.*

Political parties were not contemplated by the Founding Fathers whose aversion to "factions" was well known. Starr *"The Legal Status of American Political Parties, I"*, 34 Am. Pol. Sci. Rev. 439, 440 (1940). However, in the early years of the

* As we are here concerned with the selection of state party representatives to the convention, our brief focuses only upon that aspect of state party regulation concerning such selection. State regulation of political parties, however, is much more pervasive. Starr, *"The Legal Status of American Political Parties, I,"* 34 Am. Pol. Sci. Rev. 439, 447 (1940). "In each of the states . . . political parties are legally defined public organizations required to transact their most important business in public." Ranney *"Parties in State Politics"*, Jacob and Vines, Politics in the American States, 62 (1965). They are controlled in great detail by state legislation. As Ranney notes, the principal matters regulated are:

> "1. *Access to the Ballot.* Each state specifies the conditions an organization must meet to qualify as a political party and thus get its candidates' names printed on election ballots.
>
> 2. *Membership.* Each state stipulates the qualifications for membership in a party—that is, how one acquires the right to vote in the party's primary elections.
>
> 3. *Organization.* Each state prescribes the number, composition, selection, and functions of the various officials, committees, and conventions that constitute the parties' legal organizations.
>
> 4. *Nominating Procedures.* The state, not the parties, decides how the latters' official candidates for public office shall be selected. . . . most states require that most nominations be made publicly by direct primaries rather than privately by party caucuses or conventions.
>
> 5. *Party Finance.* Most states regulate one or more aspect of party finance: how much a party may spend in election campaigns, who may and may not contribute to party funds, what public reports of receipts and expenditures should be filed, and so on."

Republic, paries and political clubs began to form in each of the states. Although such organizations were regarded originally as private associations, that concept was rapidly overtaken in this century by the reality that such groups were the only practical vehicles for citizen participation in government. *State ex rel. LaFollette* v. *Kohler*, 200 Wis. 518, 548, 228 N. W. 895 (1930); *State ex rel. Webber* v. *Felton*, 77 Ohio St. 554, 569-570, 84 N. E. 35 (1908); *Lett* v. *Dennis*, 221 Ala. 432, 129 So. 33 (1930). As stated by the Ohio Appellate Court in 1908:

> "The national and state governments in the manner of their operation are quite different from what was contemplated in their organization. Political parties were not thought of, but so potent have they become in determining the measures and in administering the affairs of government that they are regarded as inseparable from, if not essential to, a republican form of government. In his 'The American Commonwealth', Mr. Bryce says: 'In America, the great moving forces are the parties * * *. The spirit and force of party has in America been as essential to the action of the machinery of government as steam is to a locomotive engine; or, to vary the simile, party association and organization are to the organs of government almost what the motor nerves are to the muscles, sinews, and bones of the human body. They transmit the motive power, they determine the directions in which the organs act.' " (77 Ohio St. at 569.)

Thus, more than a decade before this Court, in *United States* v. *Newberry*, 256 U. S. 232 (1921), held that political parties offered the only practical route to political office*, state

* As stated by Mr. Justice Pitney, concurring in *Newberry* v. *United States* (265 U. S. at 285-286):

> "It is a matter of common knowledge that the great mass of the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy, their interest, their environment, and various other influences, sentimental and historical. So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in

courts recognized that fact and held that primary election laws were necessary to insure the electorate's participation in the operation of political parties and in the nomination of their candidates.

Prior to the enactment of the state statutes, political parties determined their membership and the selection of officers and candidates for public office. However, serious abuses in uncontrolled party activity compelled regulation. Penniman, Sait's *American Parties and Elections*, pp. 257-258 (5th ed. 1952). Beginning in the late 19th century, the states began to enact laws which regulated party functions by providing for primary elections. Merriam and Overacker, *Primary Elections*, pp. 15-16 (1928). "The legislatures of almost all of the states have prescribed in such detail the manner of making nominations that the right to nominate has been altered, on the whole, from an inherent right to a statutory one. In fact, the nomination of candidates has been held to be a mere privilege, granted at will by the legislature under appropriate regulations." Starr, *"The Legal Status of American Political Parties, I"*, 34 Am. Pol. Sci. Rev. 439, 451 (1940).

Today, the overwhelming weight of authority holds that where a state legislature has determined to regulate the right to political office, particularly by means of a primary election, party officials or committees cannot impose requirements or disqualifications inconsistent with those authorized by statute. *Briscoe* v. *Boyle*, 286 S. W. 275 (Tex. Civ. App., 1926); *Malone* v. *Superior Court in and for the City and County of San Francisco*, 40 Cal. 2d 546, 551, 254 P. 2d 517 (1953); *State ex rel. Cook* v. *Houser*, 122 Wis. 534, 100 N. W. 964 (1904); *Walling* v.

an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations, and constrained to consider their eligibility, in point of personal fitness, as affected by their party associations and their obligation to pursue more or less definite lines of policy, with which the voter may or may not agree. As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."

Lansdon, 15 Ida. 282, 300-303, 97 Pac. 396 (1908); *Walker* v. *Grice*, 159 S. E. 914, 917-918 (S. C., 1931); *Kinney* v. *House*, 10 S. 2d 167, 168 (Ala. 1942); *Bentmen* v. *7th Ward Democratic Executive Committee*, 421 Pa. 188, 199-203, 218 A. 2d 24 (1966); *O'Brien* v. *Fuller*, 93 N. H. 221, 228, 39 A. 2d 220 (1944); *Lasseigne* v. *Martin*, 202 S. 2d 250, 255 (La. Ct. App. 1967); *Shelly* v. *Brewer*, 68 S. 2d 573 (Fla. 1953); *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 S. 144, 146 (1920); *D'Alenberte* v. *State ex rel. Mays*, 56 Fla. 162, 47 S. 489, 499 (1916); *Application of McSweney*, 61 Misc. 2d 869, 307 N. Y. S. 2d 88 (1970); *Currie* v. *Wall*, 211 S. W. 2d 964, 967 (Tex. Ct. Civ. App., 1949); *Morris* v. *Peters*, 46 S. E. 2d 729, 738 (Ga., 1948); *State* v. *Martin*, 24 Mont. 403, 62 Pac. 588 (1900).

Where the legislature either has not acted or has permitted matters (such as party loyalty oaths) to remain in the hands of the party, the governing body thereof is free to regulate the matter.* Where, however, the state has established regulations governing the selection of party officials or the criteria for voting in the party primary, the matter is no longer within the party's jurisdiction. *Lett* v. *Dennis*, 221 Ala. 432, 434, 129 So. 33 (1930)**.

* Thus, for example, in *Irish* v. *Democratic Farmer-Labor Party*, 287 F. Supp. 794 (D. Minn., 1968), and *Democratic Farmer-Labor State Central Committee* v. *Holm*, 227 Minn. 52, 33 N. W. 2d 831, 833 (1948), the decisions concerned matters which were not governed by statute and therefore lay within the scope of the party's authority. The Minnesota Statute (Minn. Stat. 202.22-27) cited by the court in *Irish* expressly vests final authority in the party's state central committee.

** The principle that a party's highest tribunal or convention may decide a matter not governed by state law is expressly reaffirmed in *Smith* v. *McQueen*, 232 Ala. 90, 166 So. 788 (1936), cited by petitioners (Pet. Br. p. 77) for their thesis that a national convention is always the supreme authority regarding delegates. There, certain party members sought by mandamus to require the chairman of the state party to certify them as candidates for election as delegates to the national convention. The court stated:

". . . The following from the text of 20 Corpus Juris, 137, is well supported by the cited authorities: *'Except to the extent*

The right of the states to prescribe primaries as the exclusive method for selecting party candidates and officers has repeatedly been found to be well within the state's police power to regulate in the public interest. *State ex rel. Webber* v. *Felton*, 77 Ohio St. 554, 567, 84 N. E. 85 (1908); *Hooper* v. *Stack*, 69 N. J. L. 562, 56 Atl. 1 (1903); *Kenneweg* v. *Commissioners*, 102 Md. 119, 123, 62 Atl. 249 (1905); *State ex rel. McCarthy* v. *Moore*, 87 Minn. 308 92 N. W. 4 (1902); *Ladd* v. *Holmes*, 40 Ore. 167, 66 Pac. 714 (1908); *Sadloch* v. *Allan*, 25 N. J. 118, 122 (1957); *Mairs* v. *Peters*, 52 S. 2d 793 (Fla., 1951); *Riter* v. *Douglass*, 32 Nev. 400, 419-420, 109 Pac. 444 (1910)*;

> *that jurisdiction is conferred by statute or that the subject has been regulated by statute*, the courts have no power to interfere with the judgment of the constituted authorities of established political parties in matters involving party government and discipline, or to determine disputes within a political party as to the regularity of the election of its executive officers.
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> * * * * *
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> The first inquiry is, therefore, to what extent is the subject matter of this petition affected by the provisions of the above cited statute?
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> * * * * *
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> And the concluding sentence of the section, which is of controlling influence here, is as follows: 'The State Executive Committee of a political party may determine from time to time what party officers shall be elected in the primary; provided, candidates for all party offices shall be elected under the provisions of this Act *unless the method of their election is otherwise directed by the State Executive Committee of the party* holding the election.' " (232 Ala. at 92, emphasis added.)

The court then found that the party executive committee had properly chosen to select the delegates itself, as was within its discretion. The Illinois Election Code vests no such discretion in the party; the selection of delegates is solely within the power of the voters in a primary.

* In *Riter* v. *Douglass*, 32 Nev. 400 (1910), plaintiffs challenged the constitutionality of the Nevada law alleging, *inter alia*, that the statute deprived political parties of the right to determine their membership. The Nevada Supreme Court held that the federal Constitution gave the State the power to legislate in all areas not expressly reserved to Congress and the State Constitution gave the legislature the power to enact laws on any subject not prohibited by the State Constitution:

(*Continued on next page*)

Hennegan v. *Geartner*, 186 Md. 551, 554-555, 47 A. 2d 393 (1945). See also *Opinion of the Justices*, 315 Mass. 761, 765 (1944).

Originally state political parties chose officers and candidates in small caucuses of self-appointed individuals. These caucuses later expanded into conventions. The absence of state statutes left the parties free to choose and disqualify members and candidates as they pleased. However, public dissatisfaction with the bitter factional disputes, manipulations and abuses of the conventions led many state legislatures to enact primary election laws. *Anderson* v. *Cook*, 102 Utah 265, 274, 130 P. 2d 278 (1942); *State ex rel. LaFollette* v. *Kohler*, 200 Wis. 518, 548-549, 228 N. W. 895 (1930). The purpose of these laws was to assure all qualified party electors a voice in the naming of candidates and the widest possible choice among alternative nominees. *State* v. *Meier*, 115 N. W. 2d 574, 576 (N. D., 1962).

In the words of Judge Alton B. Parker, himself once a candidate for president of the United States, the purpose of primary election laws was ". . . to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downward." *People ex rel. Coffey* v. *Democratic General Committee*, 164 N. Y. 335, 341-342 (1900)*; *State ex rel. Miller* v. *Flaherty*, 23 N. D. 313,

> "A proper administration of the affairs of a sovereign state affects vitally the welfare of the existence of its citizens, and, where such a matter of vital importance is at stake, the state has the right, under the police power vested in its legislature, to make such reasonable regulations in the interest of public welfare for the nomination of the candidates of the various parties as it may determine." (at p. 419.)

* "The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot, and thus given effect, *whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling.* In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead

327, 136 N. W. 76 (1912); *Riter* v. *Douglass*, 32 Nev. 400, 420, 109 Pac. 444 (1910).*

In the enactment of primary laws, the states recognized what this Court later held in *Nixon* v. *Condon*, 286 U. S. 73 (1932) and *Smith* v. *Allwright*, 321 U. S. 649 (1944), i.e., that in a democracy the right to choose candidates for public office is as valuable to the citizen as the right to vote for them after they are chosen. *State ex rel. Adair* v. *Drexel*, 74 Neb. 776, 790-791, 105 N. W. 174 (1905); *State* v. *Junkin*, 85 Neb. 1, 7 (1909); *Rouse* v. *Thompson*, 228 Ill. 522, 81 N. E. 1109 (1907); *People ex rel. Breckon* v. *Board of Election Commissioners*, 221 Ill. 9 (1906). Thus, where the election laws specify the qualifications for voters at a primary election, party officials cannot impose requirements other than those imposed or permitted by law. *Brown* v. *Cole*, 54 Misc. 278, 104 N. Y. S. 109 (1907); *Young* v. *Beckham*, 115 Ky. 246, 72 S. W. 1092 (1903); *State ex rel. Trosclair* v. *Parish Democratic Committee*,

of permitting leaders to construct it from the top downward." *People ex rel. Coffey* v. *Democratic General Committee*, 164 N. Y. at 341-342. (Emphasis supplied.)

* The Nevada Supreme Court viewed the relationship between the party electorate and the party convention as follows:

"One of the purposes of the direct primary law was undoubtedly to remove candidates from the influence of convention dictators or bosses or those who manipulate the selection of candidates by a superior knowledge of politics in convention by making such candidates so selected, should a convention be held anyway, be ratified by a majority of the voters of the particular party before they become nominees. In other words, the voters may select their candidates directly; or can either ratify the nominations of candidates nominated and recommended by a convention, should a convention be held, or in opposition to the convention candidates, if a convention should be held, reject such candidates if a majority of the voters of the party are not satisfied, or ratify as many of the nominations of such convention candidates as meet with the approval of a majority of the party. *So it is plain that the purpose of the law is not to destroy political parties as contended, but rather to secure and preserve the right of the electors to select their own candidates if not satisfied with the candidates selected in a convention, were one had, for the purpose of the illustration suggested.*" (32 Nev. at 420-421, emphasis supplied.)

120 La. 620, 45 S. 526 (1908). Similarly, where the primary election law governs the qualifications for and right to run as a party nominee for public or party office, the party may not impose requirements on candidacy or the right to hold party office other than those specified in the statute. *State ex rel. Hinyuv* v. *Parish Democratic Committee*, 173 La. 857, 138 S. 862 (1931); *Malone* v. *Superior Court in and for the City and County of San Francisco*, 40 Cal. 2d 546, 254 P. 2d 517 (1953); *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 S. 144.*

Opponents of state party regulation in general and primaries in particular have urged, in much the same manner as petitioners here, that parties are voluntary organizations and therefore have the right to determine their membership, officials and candidates without government interference. The state courts have uniformly rejected this thesis, holding that primary laws do not infringe upon the right to form parties while recognizing that the importance of parties in the functioning of a democracy warrants reasonable controls to assure voter participation in party affairs. *State ex rel. LaFollette* v. *Kohler*, 200 Wis. 518, 228 N. W. 895 (1930); *State ex rel. Webber* v. *Felton*, 77 Ohio St. 554, 570, 84 N. E. 85 (1908); *Ladd* v. *Holmes*, 40 Ore. 167, 66 Pac. 714 (1908); *Riter* v. *Douglass*, 32 Nev. 400, 109 Pac. 444 (1910).

Elections in Illinois are, by mandate of the Illinois Constitution of 1970 (Art. 3 § 4), and its predecessor, the Constitution of 1870, "free and equal." The courts of Illinois have long required that primary elections be free and open to all qualified party electors. *Craig* v. *Peterson*, 39 Ill. 2d 191, 233 N. E. 2d 345, 347 (1968); *People* v. *Beatharge*, 401 Ill. 25, 37, 81 N. E. 2d 581 (1949); *People ex rel. Breckon* v. *Board of Election Commissioners*, 221 Ill. 9, 18-19 (1906). The Illinois primary laws

* Thus, presidential electors nominated by a state convention when the law specified that they were to be chosen by a primary election, were not the party's legal nominees and could not be placed on the general election ballot. *Lillard* v *Cordell*, 200 Okla. 577, 198 P. 2d 417 (1948).

provide the exclusive method by which convention delegates and other party leaders are to be elected. Under Illinois law, the delegates are the legal representatives of both the party and the people at the Convention. As stated by the Supreme Court of Illinois in *People* v. *Swietzer*, 282 Ill. 171 (1918):

> "They are elected at a direct primary election of their respective political parties in which each member of the party is entitled to exercise his choice, and they are made the legal representatives of their respective parties. They are elected as the general representatives of the members of the party, and collectively they constitute the county convention for nominating candidates and may exercise all the powers of the political party in that regard." (282 Ill. at 176.)

To safeguard the validity of primary elections, the Code provides for specific methods of challenging the election procedures and the results thereof so as to preserve due process rights. Thus, the entire statutory scheme in Illinois requires that political parties be constructed, in the words of Judge Parker, "from the bottom upward" rather that "from the top downward."

Petitioners' challenge rests on the premise that they and various party functionaries are a force superior to the will of the voting majority and that the votes cast for delegates at a legally constituted election are somehow less significant than any other votes. This premise is diametrically opposed to the Illinois Constitutional guaranty of "free and equal" elections which holds that each vote is equal in its influence on the result as any other vote. *Craig* v. *Peterson*, 39 Ill. 2d 191, 233 N. E. 2d 345 (1968); *Moran* v. *Bowley*, 347 Ill. 148, 162-163, 179 N. E. 526 (1932). As early as 1886, the Illinois Supreme Court stated in *People ex rel. Grinnell* v. *Hoffman*, 116 Ill. 587 (1886):

> "Elections are free where the voters are subjected to no intimidation or improper influence, and where every voter is allowed to cast his ballot as his own judgment and conscience dictate. Elections are equal when the vote of every elector is equal, in its influence upon the result, to the vote of every other elector,—when each ballot is as effective as every other ballot." (116 Ill. at 599.)

Illinois' primary election laws have been in effect for approximately sixty years. They are intended to maximize participation in the political processes of the state.* For years, a certain percentage of delegates to the Convention were popularly elected. The law was amended prior to the 1972 primary to provide for popular election of an even greater number of convention delegates.** The constitutional validity of the Illinois law and primary election laws in other states has been well established in numerous cases decided over the past 73 years. See Starr, *"The Legal Status of American Political Parties, I,"* 34 Am. Pol. Sci. Rev. 439, 448 (1940). Petitioners in this case either lost in the primary or declined to run. Therefore the state may say that they cannot hold the offices to which they were not elected. See, *Sadloch* v. *Allan*, 25 N. J. 118, 124-125, 335 A. 2d

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* In *People ex rel. Breckon* v. *Board of Election Commissioners*, 221 Ill. 9 (1906), relator filed a petition for a writ of mandamus to direct the defendant Board of Election Commissioners to allow the Socialist Party to hold a primary election. The Illinois Supreme Court stated (at 18-19):

> "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is precisely of the same nature. There is scarcely a possibility that any person will or can be elected to office under this system unless he shall be chosen at a primary election, and this statute, which provides the methods by which that shall be done and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law. It is undoubtedly true, as urged by counsel for defendants, that it has become not only proper, but necessary, to provide additional safeguards and protection to the voters at primary elections, to the end that their will may be fully expressed and faithfully and honestly carried out, and any law having that object in view would naturally commend itself to the law-making power. The legitimate purpose of such a law, however, must be to sustain and enforce the provisions of the Constitution and the rights of the voters, and not to curtail or subvert them or injuriously restrict such rights."

** This legislation was also in accord with Party Guidelines, see p. 4, fn. *supra*.

173 (1957); *State ex rel. McCarthy* v. *Moore*, 87 Minn. 308, 92 N. W. 4 (1902) (holding that a candidate who was defeated in the primary could not thereafter have his name printed on the ballot in the general election).

To hold, as petitioners urge, that the national convention, (which is itself nothing more than a meeting of the state and territorial parties), may, in effect, forbid the states from controlling their own election laws will work a radical change in the regulation of our political parties. Petitioners chose themselves as the delegates in a manner reminiscent of the earliest, and now discredited, caucuses in which delegates were self-appointed. In petitioners' meetings only certain of the losers in the primary could vote and no popular participation by Democratic electors was permitted. This reincarnates the very abuses which the primary election laws were designed to eliminate.

It bears repeating that the Illinois court did not, as petitioners argue, seek to dictate to the Convention who it must accept. ". . . [T]he Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the delegates and challengers under the Illinois Election Code." 302 N. E. 2d at p. 622. (A. 132.) The state court merely forbade certain Illinois citizens from usurping party offices to which they were not elected. It is possible that the Convention would have rejected the elected delegates and that Chicago, Illinois would have been without representation at the convention. This result would be preferable to a situation in which spurious representatives who were not elected would be permitted to speak for the Democratic Party electorate. The right of citizens to vote effectively in a primary for party representatives is now deeply engrained in the political fabric of many states. Petitioners, however, would deny to the states the power which has been upheld for at least seven decades to require that all citizens be allowed an equal voice in choosing their party's representatives. Neither petitioners nor the Convention have authority to impose on the voters of Illinois pretenders, such as petitioners, who are without any mandate from the people.

III.

POLITICAL PARTIES AND CONVENTIONS CANNOT CONSTITUTIONALLY SUPERSEDE A VALID STATE PRIMARY LAW PROVIDING FOR POPULAR ELECTION OF CONVENTION DELEGATES.

A. "National Parties" and National Nominating Conventions Do Not Supersede the States.

Neither the "National Party" nor the Convention are empowered to grant to petitioners exemption from obedience to legitimate state regulatory schemes. The Guidelines "in no way take precedence in the State of Illinois over the Illinois Election Code." 302 N. E. 2d at p. 625. (A. 137.) Nor can the interposition of a defense that the Convention seated petitioners invalidate the effect of an injunction lawfully issued by a state court against certain of its citizens to protect constitutionally valid rights and interests of the state and its electorate. Neither the "National Party" nor the Convention is a governmental or quasi-governmental body to which a court, state or federal, owes deference. At best, these bodies are agencies affected with a public character and constitutional obligations because they are directed toward the control of governmental personnel and policies.*

Petitioners and amicus make extravagant claims for the powers of both the "National Party" and the "National Nominating Convention." Analysis, however, demonstrates that these claims are unjustified. The "National Party" is not a monolithic, supernational entity standing above, or even on a par with, federal or state governmental units. Nor have "national nominating conventions" acted as if their Calls supersede state law. (See, *infra* Section III B.)

* In the context of the instant case, it is not necessary to determine whether Convention action is "state action" within the meaning of the Fourteenth Amendment.

Although reference is generally made to the "national party," non-ideological analysis of the nature of the two major parties confirms that they have practically no national organization and that the central offices thereof have no effective control over the structures, procedures, performances, policies or morals established by the state parties of the same name. The national parties are more accurately defined as loose coalitions of state parties intermittently united to capture the presidency. Ranney, *Parties in State Politics*, in Jacob and Vines, *Politics in the American States* 61 (1965); Fenton, *People and Parties in Politics* 19 (1966). "The function of the Democratic National Committee and the Republican National Committee with offices in Washington is admittedly confined to arranging the next presidential convention. . . . The Democratic and Republican parties are each a federation of fifty state parties, each with its own independent structure, rules, procedure and traditions, constrained by diverse state laws." National Municipal League, *State Party Structure and Procedure* 1 (1967).*

It is characteristic of American parties that they are loosely structured and highly decentralized. In fact, it is well recognized that at no time in American history has there been a nationwide political party of enrolled members. See *U. S. News & World Report*, July 10, 1972, p. 13, col. 3; Stewart, *One Last Chance, the Democratic Party, 1974-76*, 176 (1974). To this extent, our political parties reflect our federal system and "the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U. S. 37, 44 (1971). The coming together of the state parties in a quadrennial meeting under a single banner serves to tie together what would otherwise be diffusive elements in "Our Federalism". The parties do no more than reflect the diversity of the states and, as demonstrated in Part II hereof, take their structure and organization from them except insofar as the common goal of electing a president and an overlay of federal law serve to regulate some aspects of political life.*

* The National Municipal League is in the process of updating its state-by-state compendium. Counsel is advised that the conclusions reached in the volume soon to be published are identical to those quoted from the 1967 study.

Nor is the Convention truly supreme. National conventions, and national committees, are the creatures of the state parties, not their masters. National committee members and delegates from each state to the national convention are selected by state party organizations (e.g. a committee or convention) or by popular primary election. Thus, the national governments and committees are little more than confederations of local entities and leaders. Fenton, *People and Parties in Politics*, 93 (1966). The convention meets only at intervals; it has no continuous existence. It is brought together for a specific, temporary function and is dissolved when that function is discharged.

The convention represents an advance over earlier methods for selection of the presidential nominee. Originally the nominee was chosen by a small group of party leaders. The arena of participation was broadened to a caucus and ultimately a national assembly was called where representatives from the various states could meet in a convention.

The advantages of such a national assembly reflecting the will of the people of the various states were stated by the Chairman of the Democratic Convention in his opening address in May, 1832, at the first Democratic National Convention:

> "The object of the representatives of the people of New Hampshire, who called this convention was, not to impose on the people, as candidates for either of the two first offices in this government, any local favorite; but to concentrate the opinions of all the states. They believe that the great body of the people, having but one common interest, can and will unite in the support of important prin-

* For a compendium of such laws see Hupman and Thornton, *Nomination and Election of the President and Vice President of the United States* (January 1972), and the May 1972 supplement thereof.

> ciples; that the operation of the machinery of government confined within its legitimate sphere is the same in the north, south, east and west; that although designing men, ever since the adoption of the Constitution, have never ceased in their exertions to excite sectional feeling, and to array one portion of the country against another the great and essential interests of all are the same. They believe that the coming together of the representatives of the people from the extremity of the union would have a tendency to soothe, if not to unite the jarring interests, which sometimes come into conflict, from the different sections of the country . . . They believed that the example of this Convention would operate favorably in future elections; that the people would be disposed, after seeing the good effects of this Convention in conciliating the different and distant sections of the country, to continue this mode of nomination." Quoted in Penniman, Sait's *American Parties and Elections*, 266-267 (1948).

The choice as to who shall be the "representatives of the people" has traditionally been left to state parties and legislatures. Schmidt and Whalen, *Credentials Contests at the 1968- and 1972- Democratic National Conventions*, 82 Harv. L. Rev. 1438, 1456 (1969).

For a century and a half, the Democratic Party remained largely indifferent to the procedures used by state parties in selecting delegates to the national convention. This indifference extended to rejection by its own Credentials Committee of several contests based upon alleged violations of state law and state party rules. Segal, *Delegate Selection Standards: The Democratic Experience*, 38 Geo. Wash. L. Rev. 873, 878 (1970). Thus, the proposition sometimes asserted by contemporary commentators that the call for a national convention supersedes state law "is unjustifiably broad." Raymer, *Judicial Review of Credentials Contests: The Experience of the 1972 Democratic National Convention*, 42 Geo. Wash. L. Rev. 1, 21, fn. 135 (1973).*

* It should be noted that the series of law review articles asserting the bald proposition that the call for a national convention supersedes state law or that the Convention solely or "traditionally" controls the seating of delegates have been written by various persons involved with the drafting and enforcement of the Guidelines used by the 1972 Democratic Convention. Raymer was a member of the 1972 Credentials Committee, 42 Geo. Wash. L. Rev. at p. 1 (1973); Calvin Bellamy (*Applicability of the Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention*, 38 Geo. Wash. L. Rev. 892 (1970)) was Legislative Assistant to the Chairman of the Democratic Party's Commission on Rules; Schmidt and Whalen (82 Harv. L. Rev. 1438 (1969)) represented petitioners at the Convention and on review; Eli Segal (*Delegate Selection Standards; The Democratic Party's Experience*, 38 Geo. Wash. L. Rev. 873 (1970)) was counsel to the Democratic Party's Commission on Party Structure and Delegate Selection. The plethora of law review articles asserting the same proposition is reminiscent of the "steamroller" tactics employed at the 1912 Republican Convention which served as an example to the nation of the inadequacies of Convention procedures. That discredited Convention caused a party split and gave impetus to the movement for direct primaries. David, Goldman and Bain, *The Politics of National Party Conventions* 260-261 (1960). The term "steamroller" described the following manipulation of credentials:

> "The faction controlling the national committee would sponsor contests against delegations committed to its opponents. Then its majority, voting in the national committee, would seat the faction's delegations on the temporary roll. The convention majority thus created could then vote itself onto the permanent roll in preparation for controlling the nominations. This game could be played easily with the delegations from the southern states, which after the Reconstruction period owed no responsibilty to any substantial constituency."

Traditional students of the primary system and convention history have generally considered that a system whereby the state elects its delegates to the National Nominating Convention settles seating controversies. In such circumstances there is little opportunity for contests to arise, unless losing candidates allege fraud in the voting or in the counting of the ballots. Goodman, *The Two Party System in the United States*, 196, 206 (3rd Ed.); Overacker, *The Presidential Primary* 166-167 (1926).

Thus, commentators on the conventions have considered the principle to be firmly established that the national nominating convention will recognize the selection of delegates chosen in a non-discriminatory primary election. See Merriam and Over-

acker, *Primary Elections* 187 (1928). ". . . [N]o delegation elected in a primary has been the subject of a seating contest of any significance since 1912 [the year of the "steamroller"]. Even delegations elected in open primaries that were apparently raided by members of the other party have been seated without comment on the questionable nature of their credentials . . . [T]he fact that apparently no such effort [to mount a seating contest after a primary election] has ever been pressed is attributed to the legitimacy with which primary elections are endowed by public attitudes, so long as the state's own procedures have been duly followed, and even when the vote is not confined by law to members of the party." David, Goldman and Bain, *The Politics of National Party Conventions* 264-265 (1960).

In fact, most commentators have considered that a rejection of popularly elected delegates would be unconstitutional as in derogation of the right of citizens to participate and vote in the nomination and election of the president. Note, *Judicial Intervention in the Presidential Candidate Selection Process: One Step Backwards*, 47 N. Y. U. L. Rev. 1220, 1221 (1972); Raymer, *Judicial Review of Credentials Contests: The Experience of the 1972 Democratic National Convention*, 42 Geo. Wash. L. Rev. 1, 36 (1973).

Popular election of delegates to national nominating conventions began as a direct result of abuses fostered by the Convention itself. In the 1904 Republican Convention, a dispute arose between two groups of Republican party officials, each claiming that it had held a regular and proper state convention to choose candidates for the general elections and delegates to the party's national convention. Wisconsin statutes provided for the creation of a party tribunal to make determinations and advise the Secretary of State in such disputes. The tribunal designated by the Wisconsin statutes decided for one group; the national convention for the other. This led to the decision of the Wisconsin Supreme Court in *State ex rel. Cook* v. *Houser*, 122 Wis. 534,

100 N. W. 964 (1904)* and, subsequently, to the passage by the Wisconsin legislature in 1905 of the first primary election law. Overacker, *The Presidential Primary* 10-11 (1926).

On reflection, it does not appear unusual that the state should have so strong a voice in the selection of delegates to the conventions which choose the nominee of our principally designated parties for President. The Constitution and federal statutes provide that the electors for President shall be appointed in each state and that the state shall settle controversies or contests concerning their appointment. U. S. Const. Art. II, § 1; U. S. Const. amend. XII; 1 U. S. C. ch. 3, as amended. In Illinois, electors are chosen by state party convention. They meet, pursuant to statute, on a date subsequent to the popular election, to cast their ballots in the electoral college. Ill. Rev. Stat. ch. 46, §§ 7-9, 21-4. Although the names of the Presidential nominees appear on the ballot in Illinois, this appears to be by tradition and for convenience rather than by statutory requirement. There is no statute

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* The Wisconsin Supreme Court stated:

> "We do not find anything in any . . . cases remotely, even, sustaining the proposition that the decision of the national convention of a party is superior to the decision of a state tribunal of the same party, where the latter tribunal is made the sole judge by legislative enactment, or otherwise.
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> "In view of the foregoing, since the law of this state has provided the conditions under which the party nominees shall go upon the official ballot, how can it be reasonably said that the decision of the national convention of a party can nullify it? The answer seems so plain as not to warrant this extensive treatment of a matter. Nothing but the great importance of the case could be held to justify it. The moment the conventions performed their work of choosing candidates, the rights of such candidates to have their names placed upon the official ballot became irrevocable privileges, subject only to the legislative condition. *That such condition could be displaced by any mere party authority, either within or without the state, dignifying it as paramount to the sovereign will of the people and so binding its courts and its special tribunal created to decide the matter does not seem to us to have support in reason or authority.*" (122 Wis. at 586, 589, emphasis supplied.)

either of the United States or of the State of Illinois providing for the appearance of the name of the Presidential candidate on the ballot. Thus, in accord with the constitutional mandate, it is the state which (subject to certain limitations hereinabove referred to) regulates and determines its own election procedures.

Petitioners would have the Convention assume greater powers over its membership than those accorded Congress. As this Court held in *Powell* v. *McCormack*, 395 U. S. 486 (1969), the House of Representatives has no power to exclude from its membership any person who was duly elected by his constituents and who met the age, citizenship and residence requirements specified in the Constitution. As stated by the Court:

> "Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. In short, . . . examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote." (395 U. S. at p. 548).

The Convention, too, "has an interest in preserving its institutional integrity." There are many methods, however, which can be employed by the Convention, short of excluding popularly elected delegates, by which this can be accomplished. Membership on convention committees may be denied. Party offices can be given to representatives of those states whose delegates are not questioned or to non-elected citizens of the state in question.

The history of our political parties has been one of conflict, accommodation and give-and-take among competing groups within the party. The primary election is one of the time honored methods by which such disputes may be resolved. The decision of the party electorate, however, once again, is inviolate, and cannot

be erased or overridden by the Convention's denial of admission to a popularly elected group of delegates.

It is not "an obviously intolerable result" (A. 13) that the fifty states establish the qualifications of their respective delegates. Party policy is not determined and imposed from "on high" but is a result of accommodation among the various groups within the party. If a state delegation, selected by a constitutionally permissible nondiscriminatory method, is unwilling to abide by such policy, and professes its disloyalty to the Convention or the nominee, its proper course is to leave the Convention. This, however, differs from pre-convention exclusion because the elected delegates are somehow "tainted."

B. The History of National Convention Credentials Disputes Does Not Reveal the Existence of a Compelling National Party Interest to Overturn the Results of a Free and Open Primary Election.

The history of national convention credentials contests does not provide the precedential authority attributed to it by petitioners. The credentials contests discussed by petitioners and amicus involved delegations which were presumably selected pursuant to a method authorized by the state law, but petitioners have failed to consider either the full context of the various challenges or the substance of the state laws under which the challenged delegates were selected. Moreover, while petitioners' survey of credentials contests may show instances wherein a national convention refused to seat a "lawfully" selected delegation, they have failed to show a pattern of rejection by national conventions of *popularly* elected delegates chosen in free, open and nondiscriminatory primaries. Nor does the history of national conventions reflect an interest of sufficient importance to overcome the compelling interest of the state in maintaining the integrity of its primary election laws.

The fact that national conventions since 1832 have entertained credentials challenges is little more than an interesting historical statistic unless placed in the context of the times in which the challenges occurred. For example, early national party conventions were the supreme tribunals of intra-party factional disputes because there was frequently no state law governing such matters. As noted previously, early party conventions were essentially self-appointed caucuses. The national conventions were therefore logical arbitrators of the right to represent the constitutent states in the quadrennial assembly. Absent state statutes, state parties had the inherent right to govern themselves and the refusal of a national convention to seat a challenged delegation usually posed no conflict with state law.

For example, the 1880 Republican convention, relied upon by petitioners (Pet. Br., p. 54-55), had before it the issue of whether Illinois delegates chosen at district conventions should be seated over those selected at the traditional state convention. Petitioners note that the minority position urging that each state had a right to choose its method of selection was rejected by the convention. However, there was, in fact, no conflict between state law and the convention's decision, since Illinois apparently had no statutes governing the selection of national convention delegates.*

Later challenges to delegates selected in accordance with state law similarly do not reflect an historically compelling interest in replacing delegates chosen directly by the party's electorate with those who have not successfully pursued their seats in a primary. Most of these challenges concern delegations selected by the discretionary authority of either a state party convention or a

* Thus, a speaker urging support of the traditional state convention's choices referred only to ". . . the precedents which have been established by long usage of the party in the state of Illinois." (Proceedings, 1880 Republican National Convention, p. 105). Another speaker admitted that his "title" to the convention seat was nothing more than the credentials issued to him by the state convention. (Id. at p. 113).

group of party officials.* As previously shown (Part II hereof), state courts have uniformly held that where a statute is either silent with regard to a party function or leaves the matter to the party's discretion, party rules govern the issue. In such circumstances, the action of a state party might well be overruled by the national convention for want of any other authority with jurisdiction to do so. Action of a national convention does not necessarily conflict with state law where the law either by default or positive direction renders certain matters internal affairs of the party. State courts typically decline to interfere with political parties if a matter such as convention delegate selection is left to the internal discretion of the state party. There is no conflict with state law when another level of the party challenges the discretionary action of a constituent state organization. Thus, in assessing the precedential weight of prior credentials challenges, the extent of the discretion vested by statute in party organs or functionaries must be examined in detail. The context in which the cited challenges arose and were disposed of must be similarly examined, since the circumstances of each challenge bear on its validity as historical precedent.**

One of the clearest recent examples of a challenged delegation chosen by whim of state party officials was the Georgia delegation to the 1968 national convention. Georgia state law gave

* Thus, for example, certain at-large delegates from Virginia challenged at the 1888 Republican National Convention were selected by the state committee because the "organic law" of the state apparently so directed. (See, Proceedings of 1888 Republican National Convention, p. 75).

** Thus, for example, the minority report opposing the seating of the "regular" Mississippi delegation to the 1948 Democratic National Convention did not support a group of challengers since none existed. The sole objection to the Mississippi delegation concerned the conditions appended by the state convention to the delegation's credentials binding them to withdraw from the national convention unless it approved a plank supporting states' rights and denying the delegates the power to bind the state party to the support of any nominee who favored President Truman's civil rights program or failed to denounce that program. (Bain and Parris, *Convention Decisions and Voting Records* (2d Ed.) 1973, p. 273.

to the party executive committee complete power to formulate rules governing delegate selection. These rules, in turn, empowered the state chairman to designate all of the delegates to the national convention. The state chairman together with then Governor Lester Maddox chose all the delegates. Congressional Quarterly Service, *The Presidential Nominating Conventions—1968*, p. 108. Reacting to clear evidence of racial discrimination in the selection of delegates, the convention split the delegation between the regulars and challengers. (Id. at p. 117). However, the solution imposed by the convention did not create a conflict with state law. Georgia statutes had given untammeled control of delegate selection to party officials. When they abused their discretion, the national convention simply refused to accept their decision.

Similarly, the 1964 and 1968 challenges to the Democratic delegation from Mississippi concerned delegates chosen not by popular vote but by a convention system. The challengers alleged and proved systematic, invidious discrimination against black participation in the Democratic Party of the state. The 1964 Credentials Committee heard testimony from Mississippi blacks who were prevented by intimidation, illegal procedures and sometimes violence from even registering, let alone voting.* In addition, the loyalty of the regular Mississippi delegation was subject to serious question. The Convention imposed a loyalty oath on the regular delegation and seated two of the challengers as delegates at large to the whole convention with the rest of the challengers invited to attend as "honored guests." Bain and Parris, *Convention Decisions and Voting Records* (2d Ed, 1973) p. 315; *Proceedings of 1964 Democratic National Convention*, p. 31.

* For example, Fannie Lou Hamer, a sharecropper's wife, described the physical violence and economic pressure to which she was subjected when she sought to register to vote in Mississippi. Bain and Parris, *Convention Decisions and Voting Records* (2d Ed., 1973), p. 315.

Similarly, testimony before the 1968 Credentials Committee showed numerous irregularities and the same pattern of racial discrimination in Mississippi delegation selection procedures as in 1964. The regular party delegation had only one black delegate. Congressional Quarterly Service, *The Presidential Nominating Conventions—1968*, p. 98. However, the only issue of state law presented to the Convention was whether the so-called "Loyal Democrats" properly existed under state statutes and could use the party name (id. at p. 98). In Mississippi, as in Georgia, the statutes vested control over delegate selection not in the voters but in party organizations and personnel. In both Mississippi contests, the discretion vested in the state conventions by statute was abused through the exclusion of blacks from meaningful grass roots participation in party affairs. The 1964 National Convention expressly warned that racial discrimination against blacks in the selection of delegates was not to be repeated. *Proceedings, 1964 Democratic National Convention*, pp. 30-31. However, party officials in Mississippi, exercising the freedom of authority left to them by the state statutes, failed to heed the warning and the 1968 Convention responded accordingly.

There is an obvious contrast between the discrimination practiced by party officials in Georgia and Mississippi and the concededly free and open primary election held pursuant to the Illinois Election Code. Petitioners do not, and indeed could not, charge racial discrimination in the conduct of the Illinois primary election. Blacks and whites ran as candidates for delegate and voted without any interference from state party officials who were themselves bound by state law to accept the voters' decision. Moreover, while Georgia and Mississippi law left delegate selection to the internal workings of the political parties or their conventions, Illinois law placed such responsibility solely in the hands of the voters.

In contrast to the Mississippi and Georgia actions, the national conventions of both parties in this century have generally given

considerable deference to state law when that law authorized the rank and file party electorate to assume a meaningful role in the selection of convention delegates. Petitioners have cited the statement of Daniel O. Hastings of Delaware in the 1928 Republican Convention (Pet. Br., pp. 57-58) contending that the laws of Texas were not binding upon the Convention. Petitioners, however, failed to state that Judge Hastings was speaking for the minority report of the Credentials Committee which recommended ousting the delegation chosen in accordance with state law and that his position was overwhelmingly rejected by the full Convention.* *Proceedings of the 1928 Republican National Convention*, pp. 68-69.

The challenged Texas delegates had been elected at the state convention; the challengers, at district conventions for which apparently no provision existed in the Texas statutes. In support of the majority report, Mrs. Mabel Walker Willebrandt of California noted that the challengers had participated in the state convention but had bolted and held a rump convention. *Proceedings of the 1928 Republican National Convention*, p. 56. Mrs. Willebrandt repeatedly referred to the fact that the state convention had been held in accordance with state law and that the issue before the Credentials Committee was how the state law was to be construed. She stated:

> "It is admitted by both sides that the statute above quoted is the only provision for the election of delegates to the National Convention under the Texas law, and that if the statute is to be construed so as to provide for the election of all the delegates to the state convention, then no other provision existed under the laws of Texas for the election of district delegates to national conventions. The Attorney General of the State of Texas, at the request of the State Chairman, handed down an opinion

* Petitioners similarly failed to state that the minority report of the 1928 Democratic Convention Credentials Committee cited by them as authority (Pet. Br., p. 62, 63) was offered only as a symbol of protest without debate and that the majority report was accepted by voice vote. Bain and Parris, *id.* at p. 232.

> in which he held that the statute above quoted not only did not permit the election by district conventions of district delegates to the National Convention, but affirmatively required that all delegates both at large and from congressional districts, be elected at a state convention. * * *
>
> "The right of delegates placed upon the temporary roll to their seats depends upon the construction of the statute. *The national committee by almost unanimous vote construed the state law in harmony with the opinion of the Attorney General of the state*, and this committee is of the opinion and so declares, that the statute above referred to, clearly authorizes the election of all delegates, both at large and district, at a state convention as provided in the call issued by the Republican State Committee of Texas." *Proceedings*, pp. 58-59. (Emphasis added.)

Thus, the majority report, recognizing the existence of a procedure which provided for reasonable grass roots participation under state law, was concerned not with defying the state law, but rather construing it.

Similarly, a credentials fight involving the 1952 Texas delegation to the Republican Convention demonstrates that the convention was concerned not with its own power (as amicus implies, Amicus Br., 26-27), but with implementing the state statutes which called for popular participation through conventions in selection of national convention delegates. Under Texas law, precinct conventions were held to select delegates to county conventions which in turn selected delegates to the state convention which would then choose the delegation to the national convention. The Texas Republican Party machinery in 1952 was controlled by pro-Taft officials. However, in most of the precinct conventions, pro-Eisenhower forces unquestionably outnumbered the Taftites and the latter therefore withdrew to form rump sessions. The same thing occurred at the county level. There, Taft forces bolted the 31 largest county conventions which selected pro-Eisenhower delegates. Notwithstanding the clear pro-Eisenhower majorities at both precinct and county

levels, the state convention credentials committee controlled by Taft forces seated pro-Taft delegates from 26 of the 31 largest counties. David, Moos and Goldman, 3 *Presidential Nominating Politics in 1952*, pp. 320-323.

At the national convention, the Texas "regulars" did not deny that Eisenhower supporters were in the majority at the precinct and county conventions, but treated this fact as irrelevant on grounds that the latter were not "true" Republicans. The national convention, however, seated the Eisenhower delegates who clearly represented the will of a majority of Republican rank and file voters in the state. Id. at 325, 328-329. The national convention's action did not restrain the method of selection authorized by state law. It implemented the spirit of the state statute by preventing the manipulation of state convention procedures to thwart the will of the majority.

The absence of conflict between the will of the national conventions and the results of state primaries is far more prominent than petitioners' recitation of convention history would indicate. For a period of 55 years (from 1912 to 1967), there were no significant challenges to popularly elected delegations. David, Goldman and Bain, *The Politics of National Party Conventions*, 264-265. The challenges to elected delegations in 1908 and 1912 cited by petitioners (Pet. Br. pp. 57, 62) are of limited authority when taken in the context in which they occurred.

In 1908, Republicans with the aid of a Democratic faction "raided" the primary in certain Philadelphia congressional districts. The majority report of the Democratic Convention Credentials Committee cited as an example of the raid, the sudden rise in Democratic primary votes from 1,000 in the past to 2,700 in the 1908 primary. Bain and Parris, *Convention Decisions and Voting Records*, (2d Ed., 1973), p. 175. There is also some question as to whether the Pennsylvania "primary" was held in accordance with state statute, as the law ". . . lay unnoticed on the statute books in 1908 . . ." Overacker, *The Presidential Primary*, p. 10 (1926).

The right of states to control the selection of delegates was included in the platform of the National Progressive Republican League in 1911:

> "The Progressive-Republican League believes that popular government is fundamental to all other questions. To this end it advocates . . . third, the direct election of delegates to national conventions with opportunity for the voter to express his choice for president and vice president . . ." Overacker, id. at pp. 14-15, quoting *LaFollette's Weekly*, February 4, 1911, p. 7.

Although the 1912 Republican convention unseated two pro-Roosevelt California delegates elected in a primary, the significance of that contest is diminished substantially when placed in the context of the bitter fight between Theodore Roosevelt and William Howard Taft which split the Republican party and lead to the formation of the Bull Moose Progressive Party. There were eleven credentials contests, each decided in favor of pro-Taft delegates by virtue of the fact that Taft forces controlled the convention. The technical reason for unseating the elected Roosevelt delegates was that Taft had carried the district in a presidential preference primary. The outcome of the credentials challenges was, however, clearly nothing more than the tactical exercise of political strength, a "steamroller", but not historical evidence of a need to preserve the integrity of a national convention by igoring the results of a state primary. Bain and Parris, *Convention Decisions and Voting Records* (2d Ed., 1973), p. 175; Overacker, *The Presidential Primary* (1928), pp. 166-167, 180. Moreover, a "storm of protest" greeted the convention's action and, in its call for the 1916 convention, the Republican party expressly recognized the right of states to control the method of selecting delegates. Overacker, *id.* at 166, 180.

In contrast to the action of the Republican convention, the 1912 Democratic National Convention expressly recognized the results of a state primary. Delegates committed to Woodrow

Wilson were elected in a South Dakota primary and were certified as having received a plurality of the vote by the appropriate state authority. However, the primary winners were denied credentials by the state Democratic Party secretary in favor of losing candidates committed to Champ Clark. The national convention, however, seated the delegates who had been elected in the primary. Even the anti-Wilson New York delegates joined in the voting for the elected Wilson slate. Bain and Parris, id., at p. 187.

The sole challenges to popularly elected delegations in recent times concerned the Alabama delegations to the 1964 and 1968 Democratic conventions and centered not on the qualifications of the delegates or whether, as here, they should even have been permitted to run in the primary, but rather whether such delegates, once seated, would support the party and its nominees. The Alabama loyalty issue arose, as it had with respect to other Southern states, because presidential electors chosen in the primary were not pledged to support the nominees. The 1964 convention recognized the right of elected delegates to convention seats but voted to accept them only upon the condition that they sign a loyalty oath. Several refused to do so and withdrew from the convention. *Congressional Quarterly*, August 28, 1974, p. 1959. In 1968, the loyalty issue again confronted the Alabama delegation. Robert Vance, speaking for the elected members of the delegation is reported to have stated:

> "Vance, in reply, says, 'The whole question is: what do you do with the so-called Wallace delegates in the regular delegation?' He explains that Alabama is 'infected with an overbundance of democracy' in the sense that 'we elect everybody', including national delegates, county and state committee members, national committee members and 'even' presidential electors. Vance repeats that the entire regular delegation was elected in an 'open primary' and everyone was free to participate including Republicans and others since there is no party registration in the state . . .

> But Vance says, 'When you turn everything over to the voters, you have to take the sour with the sweet.'" (Congressional Quarterly Service, *The Presidential Nominating Conventions — 1968*, p. 120).

The Credentials Committee majority recommended again that the elected Alabama delegates be seated upon accepting an oath to support the nominees of the convention. The Credentials Committee chairman, then Governor Richard Hughes, speaking in support of the majority report observed:

> "It was a primary where over a million and a half Alabamians, black and white, were eligible to participate as compared to the contestant selection at a meeting by its total membership of approximately 200." (Official Proceedings, Democratic National Convention, 1968, p. 217).

The convention voted to seat the elected delegates again upon condition that they take a loyalty oath. Those delegates who declined to take an oath left the convention. Governor Hughes' observations, however, might well be applied to the Chicago congressional districts in this case where 700,000 Democratic voters made their choice only to have that choice taken from them in small meetings of self-appointed representatives who selected themselves as delegates by proceedings from which the voters were expressly precluded from participation.

The right of a national convention to require its delegates to swear their support for the party's nominee is not at issue here. A loyalty oath concerns the future actions of delegates who, having enjoyed the benefits of attendance at and participation in the convention, must then—if the party is to survive—abide by the convention's choice of candidates for president and vice president. Since the convention's purpose and reason for being is the selection of such candidates, the party must have the right to protect the *bona fides* of its choice. That right has not been compromised by the decision of the Illinois Appellate Court, since no issue of party loyalty was before it.

The elected delegates from Illinois were not asked whether they would choose to take an oath as a precondition to seating or, by failing to do so, to voluntarily withdraw from the convention. The Convention replaced the elected delegates with persons who had not been elected on the theory that the former had no right to run in a primary or to seats if they won, regardless of their loyalty. The verdict of the Illinois electorate was, to the Convention, as irrelevant as the choice of the Texas Republican electorate at county and precinct conventions had been to the party officials who controlled the state convention in 1952. For a convention in this day and age to bar popularly elected delegates is to revert to the abuses and manipulation of the system which led to the passage of primary laws as a means of insuring fully effective participation by qualified voters in political affairs.

Just as the integrity of the convention's choice may be protected by the imposition of a loyalty oath, so the integrity of a state's primary election which gives its citizens a direct line of participation in the convention through elected delegates must be preserved by requiring that the state's citizens obey its election law. The American political system, like the Constitution, has undergone a continuous process of maturation as this Court has expanded suffrage and assured the sanctity of the vote at every step in the electoral process. To that end, this Court has rejected a wide variety of restrictions on the right to effective candidacy and voter participation. The national conventions have similarly matured from the days of self-appointed caucuses to an assembly "of the representatives of the people from the extremity of the union." The post-war conventions in particular reflect not the supremacy of the convention's will over state law, but rather an increasing awareness that conventions must be truly representative or risk failure as public institutions in a democracy. Conventions cannot be truly representative if popularly elected delegates are excluded.

IV.

THE INJUNCTION ORDERS OF THE CIRCUIT COURT OF COOK COUNTY WERE NOT BARRED BY ANY PRIOR COURT ACTION.

A. This Court's Action in Keane v. National Democratic Party, 409 U. S. 1 (1972), Did Not Foreclose the Right of an Illinois Court to Determine Questions Concerning the Legality of Petitioners' Slate.

This Court, in expressing "grave doubts" as to the propriety of the action taken by the Court of Appeals for the District of Columbia ("CADC") in its July 4, 1972 decision, (*Keane* v. *National Democratic Party*, 469 F. 2d 563), expressly did not reach the merits of the issues presented to the CADC, to-wit, the constitutionality of various Guidelines concerning selection of delegates to the Convention. Most certainly, the Court could not have reached or decided the merits of issues not before the DCDC or CADC, to-wit, "the questions of the legality of the slate certified by the Credentials Committee. . . . the state law claims which apparently are the basis of the state proceeding, and which were not before the District Court here." *Keane* v. *National Democratic Party*, 469 F. 2d 563, 573 (1972) (A. 57). In fact, this Court stayed the injunction issued by the CADC which had for its sole purpose the restraint of state court proceedings in which the legality under the Code of petitioners' actions was to be heard.

In view of the history of the case at bar, the purpose and result of the stay was to enable the Illinois court, time permitting, to hear respondents' claim under state law.* Time did so permit.

Even the CADC, in issuing a stay of its § 2283 (28 U. S. C. § 2283), injunction to permit appeal to this Court by Keane,

* Even petitioners' counsel, in contending at the July 8 hearing that this Court's decision precluded state court action, conceded "that there is some degree of ambiguity that does exist." (T. 7/8/72, p. 32)

recognized by implication that an unconditional stay would permit the Illinois action to proceed and would permit a determination of the legality of petitioners' position under state law. Thus, the CADC granted its stay conditioned upon Keane taking no action contrary to the opinion of the CADC absent the stay.

At the time that this Court stayed the judgment of the CADC, the case at bar had already been wrongfully enjoined by federal courts on three separate occasions. First, by its removal (See p. 7 *supra*); second, in the challengers injunction action, *Cousins* v. *Wigoda*, reversed by the Court of Appeals for the Seventh Circuit (See pp. 8-9, *supra*); third by the CADC. Although this Court in its per curiam opinion referred several times to the interjection of the federal judiciary into the convention process, it did not refer to any policy which might prevent a state court from vindicating valid and substantial state interests. "The Court was discussing the Federal courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State courts over their delegates." 302 N. E. 2d at p. 622. (A. 132.) In view of the history of the pre-convention litigation, it is certain that had this Court determined that it should properly prevent the resolution of the state claims in the case at bar by a state court it would have said so.

To have barred the state court in the instant case would have been contrary to considerations of comity and federalism expressed in 28 U. S. C. § 2283 and would have totally ignored the opinion of the Court of Appeals for the Seventh Circuit in *Cousins* v. *Wigoda*, 463 F. 2d 602 (1972), *application for stay denied*, 409 U. S. 1201 (1972), mandating to the Illinois state court questions under state law concerning delegate selection. Title 28 U. S. C. § 2283 is designed to limit intervention by the federal judiciary in pending state court proceedings. See, e.g., *Younger* v. *Harris*, 401 U. S. 37, 43, 44 (1971). In the circumstances of this case, petitioners cannot argue that a state

court may not proceed when an injunction issued under that section has been stayed by this Court. Moreover, as stated by the Court of Appeals for the Seventh Circuit in *Cousins* v. *Wigoda:*

> "There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not . . . disputed those allegations. . . ." 463 F. 2d 603, 606.

That decision, not mentioned in this Court's opinion of July 7, remained fully effective throughout this litigation.

In the circumstances, the opinion of this Court did not bar an Illinois state court from making a determination of the important issues involved in the then-pending instant case. These issues may now be considered here without "time pressures . . . and . . . expedited review." 409 U. S. at p. 6. (A. 68.)

B. The July 5 Judgment of the Court of Appeals for the District of Columbia Had No Binding Collateral Estoppel or Res Judicata Effect Which Might Have Bound the Illinois State Court.

The discredited opinion of the CADC in *Keane* (469 F. 2d 563) had neither res judicata nor collateral estoppel effect. This is demonstrated by the circumstances in which that decision arose, an examination of the issues heard and decided by the DCDC and CADC, and the policy giving rise to the doctrines upon which petitioners mistakenly rely.

Res judicata depends upon an identity of issues. *Blonder-Tongue Laboratories* v. *University Foundation*, 402 U. S. 313, 323 (1971). Collateral estoppel may be applied only with respect to those issues decided and necessary to the decision in that case relied on for res judicata effect and as to which there is an "opportunity for full and fair trial." *Bourns, Inc.* v. *Allen-Bradley Co.*, 480 F. 2d 123 (7th Cir., 1973); 1B Moore's

Federal Practice 3777 (2d Ed., 1965); *Blonder-Tongue Laboratories* v. *University Foundation,* 402 U. S. 313, 330 (1971); *P. I. Enterprises, Inc.* v. *Cataldo,* 457 F. 2d 1012 (1st Cir., 1972); *Rachal* v. *Hill,* 435 F. 2d 59 (5th Cir., 1970), *cert. denied* 403 U. S. 904 (1971); *Blumcraft of Pittsburgh* v. *Kawneer Co., Inc.,* 482 F. 2d 542 (5th Cir., 1973).

The *Keane* case before the DCDC and the CADC sought a declaration that certain Guidelines for the Convention were unconstitutional and could not be used to bar Keane and the class of popularly elected delegates which he sought to represent from participation in the Convention.* The DCDC, *without hearing any evidence,* but only Oral Arguments held three of the Guidelines of which Keane complained to be unconstitutional but denied relief on the fourth. Recognizing that no state law issues were before it, the DCDC denied the Democratic National Committee's motion to enjoin prosecution of the instant case which was then pending in the state court. The CADC affirmed as regards the fourth Guideline.

The CADC, however, in deciding the issues before it stated:

"No violation of Illinois law is at issue here" (A. 54), and continued:

> "Judge Hart [DCDC] based his denial of the counterclaim [the request for injunction] on the grounds that the question of the *legality* of the slate certified by the Credentials Committee in lieu of the plaintiffs was not before him, and that there was no justiciable issue presented in this action concerning the eligibility of the members of that slate to represent the Illinois districts in question. (Emphasis added.)
>
> "In so ruling Judge Hart seems to have focused solely on the state law claims which apparently are the basis of the state proceeding, and which were not before the district court here." (A. 57.)

The instant case concerns precisely those state law claims "which were not before" the District of Columbia courts, for

* At no time was there a declaration of class in the *Keane* litigation.

which there was no "opportunity for full and fair trial," and which concern the integrity of the electoral process in Illinois and the state's interest in the protection and preservation of that process. In the instant case, Wigoda sought to enjoin petitioners from usurping the state election process, violating Illinois law and nullifying voters' and candidates' rights. The action was brought in an Illinois court solely against Illinois citizens subject to the court's jurisdiction. The Illinois court, in unchallenged findings, found that the delegates elected under the Illinois statutes, persons of white, black and Latin American extraction including males and females of all adult ages (A. 86), were elected to office

(1) in contested elections held in accord with the Illinois Election Code;

(2) by a majority of the qualified electors of the Democratic Party; and

(3) in an election which was free, equal, non-discriminatory and open to all qualified persons as candidates and voters without limitation. (A. 87.)

The trial court further found that petitioners were elected by a process

(1) which defendants [petitioners] devised on their own authority which was secret, restrictive, discriminatory, without foundation in law and without regard or recognition to the individual citizens of the congressional districts who voted in the election conducted pursuant to the Illinois Election Code;

(2) which deprived duly qualified voters of their right to vote and to vote effectively; and

(3) which subverted, thwarted and nullified the electoral procedure of the state. (A. 88.)

On these unchallenged findings there is ample authority in law for the Illinois court to act to protect the delegates, the voters and the electoral process. Moreover, none of these issues

concerning the Illinois electoral process and the legality of the competing delegations were litigated in the District of Columbia courts, nor was any evidence taken there concerning the said issues. Finally, petitioners have at no time sought to prove that these issues were before any court other than the state court or that any other court considered them or made findings with regard thereto. 302 N. E. 2d at p. 623. (App. 134.)

The right of the state court to hear these issues, however, was before the Court of Appeals for the Seventh Circuit, which held:

> "There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not . . . disputed those allegations . . . Indeed, the Rules of the National Convention, contemplate reference to state law in connection with various issues." (*Cousins* v. *Wigoda*, 463 F. 2d 603, 606.)

This Court, acting through Mr. Justice Rehnquist, denied an application for stay of the mandate of the Court of Appeals of the Seventh Circuit. 409 U. S. 1201 (1972). Thus, it appears that *Cousins*, which specifically authorized Wigoda to proceed in the state court, and not *Keane*, is the controlling prior judgment.

Moreover, the two decisions (*Keane* and *Cousins*) must each be examined in the context of the issues raised and the relief sought. In the instant case, which was the subject of the Seventh Circuit's decision, the complaint sought a declaration concerning whether Wigoda and the challenged delegates were validly elected under the Code and an injunction to prevent those not so elected from attending the Convention as delegates. The National Democratic Committee was not a party to those proceedings. Judge Covelli's orders of July 8 and August 2, 1972, did not require the Convention to seat the duly elected delegates, but rather enjoined certain Illinois citizens from

violating Illinois law by assuming offices to which they had not been duly elected. Under the decision of the Seventh Circuit in *Cousins*, such orders were clearly within the province of the state court.

The CADC recognized that the sole purpose of its injunction was to effectuate its judgment.

> "In order to protect our judgment aproving this Resolution, it is necessary to enjoin plaintiffs from taking any action in any other court that would impair the effectiveness and the integrity of the judgments of this Court." 469 F. 2d at p. 5. (App. 59.)

The necessity of protecting and effectuating the CADC's judgment fell with this Court's stay of that judgment and its expression of

> "grave doubts as to the action taken by the Court of Appeals." 409 U. S. at p. 5. (App. p. 67.)

There would have been no purpose for this Court's stay if not to permit respondent to proceed in the state court. Indeed, the CADC later confirmed that this Court meant what it said in issuing the stay, stating ". . . We think doubts suggested by [Cousins] as to the scope of the stay entered by the Supreme Court should be resolved by interpreting the Court's stay as suspending the operation of the injunction issued by this Court, July 5, 1972 . . ." *Keane* v. *National Democratic Party*, unpublished order. (See, Appendix E.)

Respondent was improperly enjoined in lower federal courts three times in this litigation from proceeding to vindicate his rights in the state courts. Each injunction was dissolved or stayed. For petitioners to claim that, notwithstanding these orders permitting Wigoda to go forward, he was somehow barred by the collateral estoppel effect of a proceeding to which he was not party (See 302 N. E. 2d at p. 623, App. 134) extends the doctrine of *res judicata* beyond any recognizable parameters. Whatever this Court's decision might be on the merits, respondent has not been previously barred by *res judicata* or

collateral estoppel from proceeding to a determination of his rights under state election laws.

Sound public policy, too, dictates that a discredited judgment, for the protection of which a court erroneously issues a Section 2283 injunction, should not be used to bar a state from vindicating interests as important as those pertaining to the right of its citizens to vote. Any other result would run counter to important considerations of comity and federalism. See *Younger* v. *Harris*, 401 U. S. 37 (1971).

Lastly, petitioners imply that the Supremacy Clause affects the instant matter. (Pet. Br. 30). It would demean the Supremacy Clause if it were employed to compel a state court to recognize a stayed and subsequently vacated judgment which this Court had strongly criticized prior to the time the state's order was issued.

V.

PETITIONERS HAVE NOT BEEN DEPRIVED OF "AN UNBIASED JUDGE"

Petitioners were afforded a fair hearing before an experienced trial judge. Their claim that the trial judge was biased does not stand analysis.

The evidence presented at the July 8 hearing was uncontested. Petitioners did not object to the trial judge's findings made after hearing evidence and examining the record. Nor did they seek an immediate appeal from his order even though procedures were available to them to do so. Instead, as found in the August 2 hearing, petitioners, in violation of the order of July 8, "acted or purported to act as delegates or alternates to said Convention and sought to perform the functions of delegate or alternate including voting on behalf of the [various congressional districts herein involved]" (A. 117).

It was only after petitioners had violated the July 8 injunction that only certain of petitioners sought a change of venue, basing

their demand upon an unverified newspaper article.* The newspaper attributed statements to the trial judge, which statements were allegedly made some time after he had heard the evidence and entered a decree.

Petitioners' Brief (p. 18) contains only the allegations made by petitioners in support of their motion for change of venue. It does not contain the trial judge's response. Said response from the bench to the charges made is reprinted here in pertinent part:

> "Insofar as the statements are attributed to me I did tell a young reporter part of it. It was two minutes to ten. I had my robe on and I was coming out here to work. This young reporter came in and said, 'Judge, will you please give me a statement?'
>
> "I said, 'I have got to go to work.'
>
> "He said, 'Well, Judge, if I don't get a statement I might get fired.'
>
> "So I said, 'All right, sit down.'
>
> "So he sat down and he said, 'What are you going to do about this?' [i.e. the televised violation of the July 8 injunction.]
>
> "I said, 'I can't do anything about it. I am the referee, I am the umpire. There is nothing I can do until or if a petition is presented.'
>
> "He said, 'Well, what can they do in Florida?'
>
> "I said, 'Well, every lawyer knows that the Federal Constitution says that each state must give full faith and credit to the decrees of another sister state.' And I said, 'The case of Rule v. Rule, 313 Illinois Appellate 108, although it is a divorce case establishes that law.' And I said, 'In my opinion the Daley outfit can file a petition in the court in Florida attaching a copy of my injunction writ and ask that court to enforce it.'
>
> • • • • •

* A substantial number of petitioners expressly disassociated themselves from the motion for change of venue or recusal. (T. 7/31/72, pp. 63, 65).

"Insofar as the other statement attributed to me, I did not make that statement to this reporter. What happened was I received a phone call while he was sitting in my chambers from a citizen. I have received several of them about this case. And I told all of them the same thing: There is nothing I can do, I cannot initiate any action and I don't intend to. Some of our citizens don't understand that.

"This particular man, whomever he was, said to me over the phone, 'Well, don't you think that Mr. Singer, delegating himself the powers that he has, has acted like Hitler in Germany and Mussolini in Italy?'

"And I said, 'Oh, come now, I am busy, I have got to go to work.'

"And he said, 'Well, don't you agree with me?'

"And I said, 'Yes.'

"And he said, 'No, I want you to tell me how you agree with me.'

"So I repeated those words that he used on the telephone, and this reporter, being a young man, didn't know that he had no right to quote me because I didn't say this to him, I said it on the telephone.

"Now, he came in to see me this morning and asked me what it was all about, and I told him. * * *" (T. 7/20/72, pp. 24-27.)

The trial judge explained the remarks which petitioners allege he made. His remarks as alleged by petitioners were taken out of context and misconstrued. His explanation is unchallenged. The fairness and adequacy of the hearing is best demonstrated, not by the trial judge's subsequent remarks, but by petitioners' failure at any stage of the proceedings to object to any of his findings of fact which underscore the injunctions issued against them.

The Illinois Appellate Court has found the action of the trial judge to be proper. 302 N. E. 2d at p. 632. (A. 151-152.) There is no federal infirmity in his failure to recuse himself. It has been consistently held that a judge may not be disqualified by his expression of views obtained from evidence presented in the course of judicial proceedings before him. *Baskin* v. *Brown*, 174 F. 2d 391, 394 (4th Cir. 1949); *Craven* v. *United States*, 22 F. 2d 605, 607-608 (1st Cir. 1927); *United States* v. *Grinnell Corp.*, 384 U. S. 563, 583 (1966). Here, the trial court's alleged remarks were made after evidence had been received and a decree entered. His comments were not predicated upon extra-judicial sources. In the circumstances, the trial judge did not display "bias".

CONCLUSION.

Based upon the foregoing, respondent and the class which he represents respectfully pray that the judgment of the Illinois Appellate Court be affirmed.

Respectfully submitted,

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APPENDIX A

BALLOT PLACEMENT AND RESULTS OF THE PRIMARY CANVASS FOR DEMOCRATIC PARTY DELEGATES TO THE NATIONAL NOMINATING CONVENTION FROM THE FIRST, SECOND, THIRD, FIFTH, SEVENTH, EIGHTH, NINTH AND ELEVENTH ILLINOIS CONGRESSIONAL DISTRICTS.

1st Congressional District

Total Dist. Party Vote—95419

Delegates to the National Nominating Convention

36868	Denise R. Harrell (Uncommitted)
37337	William H. Shannon (Uncommitted)
38781	Marshall Korshak (Uncommitted)
28165	Krishna Ray (Uncommitted)
50817	Ralph H. Metcalfe (Uncommitted)
35619	William H. Harvey (Uncommitted)
22762	Jo Freeman (Chisholm)
19484	Rosemarie C. Gulley (Kennedy)
8775	Ginger R. Mack (Uncommitted)
15531	Samuel M. Ackerman (Kennedy)
13692	Leona R. Black (Uncommitted)
14948	George L. Lowe (Kennedy)
14741	Jacquelyne D. Grimshaw (Kennedy)
9152	Henry Brown (Uncommitted)
14404	William J. Raft (Kennedy)
29895	Claude W. B. Holman (Uncommitted)
26864	John H. Stroger, Jr. (Uncommitted)
12459	Sheldon Roodman (Muskie)
8356	James A. Sanders (Uncommitted)
16708	Kathryn A. Clement (McGovern)
14955	Annette Guice (McGovern)
15129	Donald N. Levine (McGovern)
15906	James W. Wagner (McGovern)
14532	Andrew J. Hargrett (McGovern)

2ND CONGRESSIONAL DISTRICT

Total Dist. Party Vote—94360

DELEGATES TO THE NATIONAL NOMINATING CONVENTION

42833	Wilson Frost (Uncommitted)
40774	Edward R. Vrdolyak (Uncommitted)
45929	Morgan F. Murphy (Uncommitted)
36947	Henry M. Soltysinski (Uncommitted)
34895	Clair M. Roddewig (Uncommitted)
26477	Julian H. Johnson (Kennedy)
25158	Jacqueline E. Anderson (Kennedy)
24535	John P. Ahern (Kennedy)
28748	Mary Lee Leahy (Kennedy)
18710	Saul Mendelson (Kennedy)
18829	Annette M. Barrash (Kennedy)
20583	Carmen Chico (Kennedy)
18014	Louis Hirsch (Kennedy)
31173	Alexander A. Adduci (Uncommitted)
35955	Vincent A. Carey (Uncommitted)
29195	John H. Kowalewski (Uncommitted)
10345	Lar (America First) Daly (Daly)
9663	James W. Schroeder (Daly)
16232	Anthony J. Frazier (Uncommitted)
15394	Charles P. Hounihan (Uncommitted)

3RD CONGRESSIONAL DISTRICT

Total Dist. Party Vote—35777

DELEGATES TO THE NATIONAL NOMINATING CONVENTION

7814	Jack C. Davis (Muskie)
6503	Robert Wilderman (Muskie)
6667	Roberta D. Roberts (Muskie)
5984	Walter E. Laube (Muskie)
5836	Harry C. Skulte (Muskie)
5695	Paul A. Hazard (Muskie)
6559	John L. Sullivan, Jr. (McGovern)
13558	Albert R. Russel (Uncommitted)

5653	Caryl M. McCarthy (McGovern)
13267	Lawrence Petta (Uncommitted)
13062	Patrick M. O'Block (Uncommitted)
15646	John M. Daley (Uncommitted)
11813	Harry "Bus" Yourell (Uncommitted)
5395	Mary E. Barrett (McGovern)
13755	Daniel P. Coman (Uncommitted)
4207	Robert L. Engler (McGovern)
4265	Henry E. Stanton (McGovern)
2767	Mary Lee Inger (Muskie)
4647	Thomas W. Kelly (Muskie)
2981	Melvin D. Konrath (Muskie)
2284	Catherine Poindexter (Muskie)
3275	Margaret P. Shatkowski (Muskie)
2474	Conrad C. Kissel (Muskie)
7194	Jo Anne M. Caplis (Uncommitted)

5TH CONGRESSIONAL DISTRICT

Total Dist. Party Vote—109665

DELEGATES TO THE NATIONAL NOMINATING CONVENTION

70215	Matthew J. Danaher (Uncommitted)
66279	Theodore A. Swinarski (Uncommitted)
64109	Lillian M. Piotrowski (Uncommitted)
61045	Michael J. Madigan (Uncommitted)
53381	Cecil A. Partee (Uncommitted)
22573	Bernie R. Noven (Muskie)
23470	Rosemary E. Glynn (Muskie)
20475	Reginal Williams (Muskie)
21120	Donald Segal (Muskie)
18257	James N. Teale (Muskie)
19258	Gwendolyn B. Woods (Muskie)
23078	John A. Paskiewicz (Muskie)
53687	Edward M. Burke (Uncommitted)
60015	Richard J. Daley (Uncommitted)
54974	Frank K. Kuta (Uncommitted)
19079	Michael S. Shaw (Uncommitted)
22117	Kevin D. McInerney (Muskie)

7TH CONGRESSIONAL DISTRICT

Total Dist. Party Vote—89075

DELEGATES TO THE NATIONAL NOMINATING CONVENTION

45144	John D'Arco (Uncommitted)
14198	Florence Scala (Kennedy)
12863	Patrick M. Murphy (Kennedy)
10634	James Gullatte (Kennedy)
11327	Richard L. Criley (Kennedy)
12829	Rena Elizabeth De Bruin (Muskie)
9229	Sheldon L. Dittemore (Kennedy)
10914	Suzanne N. Asher (Kennedy)
9945	Fred T. Licciardi (Kennedy)
39857	Richard J. Troy (Uncommitted)
40427	Isaac Sims (Uncommitted)
42232	Vito Marzullo (Uncommitted)
41783	Mathew W. Bieszczat (Uncommitted)
44530	George W. Collins (Uncommitted)
39965	Edward A. Quigley (Uncommitted)
41281	George W. Dunne (Uncommitted)
10385	Enid H. Long (Uncommitted)
8448	Catherine Ann Crowley (McCarthy)
6458	Ronald Dorfman (McCarthy)
6424	Fred Levin (McCarthy)
6122	Bernard T. Peele (McCarthy)
5951	Ellen Peele (McCarthy)
5936	Bonni K. Steffenson (McCarthy)
6412	Norman D. Steffenson (McCarthy)

8TH CONGRESSIONAL DISTRICT

Total Dist. Party Vote—100155

DELEGATES TO THE NATIONAL NOMINATING CONVENTION

57424	Thomas J. Casey (Uncommitted)
27543	Glynn O. Sudbery (Muskie)
30293	Peter A. Andersen (Muskie)
27676	Kenneth Machynia (Muskie)
27759	Carol C. Zavala (Muskie)

25722	Lawrence T. Princivalli (Muskie)
25095	David P. Firnhaber (Muskie)
46671	Robert G. McPartlin (Uncommitted)
47184	Joseph A. Serritella (Uncommitted)
57234	Daniel D. Rostenkowski (Uncommitted)
49328	Louis P. Garippo (Uncommitted)
43753	Bettye Ashford (Uncommitted)
43301	Maria Blanca Browning (Uncommitted)
49537	Thomas E. Keane (Uncommitted)
18228	Judith M. Bieberle (McCarthy)
17291	Faith E. Ruffing (McCarthy)

9TH CONGRESSIONAL DISTRICT

Total Dist. Party Vote—110735

DELEGATES TO THE NATIONAL NOMINATING CONVENTION

25194	Judah L. Graubart (Muskie)
24788	Natalie Forman (Muskie)
25260	James H. Schwartz (Muskie)
21405	Linda G. Johnsen (Muskie)
23575	Meryl Steinberg (Muskie)
19145	Forbes J. Shepherd (Muskie)
18100	Carla Zoe Petersen (Muskie)
32651	Paul T. Wigoda (Uncommitted)
24902	Paul H. Stepan (Uncommitted)
20981	Carol G. Hochfelder (McGovern)
26132	Deana Lerner (Uncommitted)
25150	Jerome Huppert (Uncommitted)
31205	Neil F. Hartigan (Uncommitted)
19952	Sheldon Toby Zenner (McGovern)
19899	Elizabeth E. Brackett (McGovern)
11760	Ronald D. Freund (Nader)
23843	Marilou Hedlund (Uncommitted)
23448	Martin Tuchow (Uncommitted)
19444	Scott Hodes (Uncommitted)
13524	Margaret M. Sullivan (Uncommitted)
11393	Marge I. Markin (Muskie)
11078	Sharon Z. Alter (Muskie)
10046	Daniel J. McMahamon (Chisholm)
18115	Caryl Bendinger (McCarthy)

18610 Avram S. Meyers (McCarthy)
17470 Herbert M. Kraus (McCarthy)
16940 Martha E. Pitts (McCarthy)
13329 Algis K. Augustine (McCarthy)
13296 Bruce H. Bendinger (McCarthy)
11555 Ramsay L. Klaff (McCarthy)
13327 Janice E. Glenn (McCarthy)
10486 Adrienne M. Levatino (Muskie)
10259 Jeffrey Blake Winton (Muskie)

11TH CONGRESSIONAL DISTRICT

Total Dist. Party Vote—110719

DELEGATES TO THE NATIONAL NOMINATING CONVENTION

52772 Anthony C. Laurino (Uncommitted)
57545 Seymour Simon (Uncommitted)
56056 John C. Marcin (Uncommitted)
72053 Roman C. Pucinski (Uncommitted)
28204 James W. Marcinkowski (Muskie)
25179 Ralph M. Tencza (Muskie)
28883 John T. Mitchell (Muskie)
20584 James Paquet (Muskie)
20314 Dominic D. Magno (Muskie)
21567 Cathy Ann Grossmayer (Muskie)
24248 Michael S. Holewinski (Muskie)
18829 William J. Bobzin (Muskie)
37783 Thaddeus S. Lechowicz (Uncommitted)
40289 P. J. Cullerton (Uncommitted)
45982 Richard J. Elrod (Uncommitted)
42899 Thomas G. Lyons (Uncommitted)
19351 Bert C. Bielski (Muskie)
15912 Mary Gsodam (McCarthy)
17251 Raymond P. Kaepplinger (Uncommitted)
17386 David Rothstein (McCarthy)
17153 Marc H. Slutsky (McCarthy)
15896 H. R. Toch (McCarthy)

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN CONNECTION WITH THE REMAND ORDER ON THE CHALLENGERS' REMOVAL.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

June 30, 1972

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

PAUL T. WIGODA, ETC., *Plaintiff-Appellee,*
vs.
WILLIAM COUSINS, ET AL., *Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(72 C 1001)

This cause is before the Court on the motion of the appellants requesting the Court to reconsider its order of June 7, 1972, dissolving its stay of the remand order of the district court and that upon such reconsideration, the remand order be stayed pending appeal.

The only issue presented on this appeal is whether the district court erred in determining that the appellants were not entitled to remove the case below from the Circuit Court of Cook County, Illinois, to the Federal District Court for the Northern

District of Illinois and ordering that the cause be remanded to the state court.

A brief in support of their position has been filed by the appellants who, because of time factors involved in this litigation, have requested consideration on an expedited basis.

Upon consideration of the matter before us, and the arguments presented in appellants' brief, we are of the opinion that no worthwhile purpose would be served by suspending the decision of this Court until the filing of the appellee's brief.

Accordingly, being duly advised in the premises, the reasoning and result set forth in the memorandum opinion of the district court is now adopted as the opinion of this Court and the order of the district court is affirmed and this appeal is dismissed.

We express no opinion as to the effect of state law on the determination of proper delegates to the Convention.

APPENDIX C

OBJECTIONS TO THE REPORT OF THE HEARING OFFICER

NOTICE OF REQUEST FOR CONSIDERATION AND EXCEPTIONS TO FINDINGS OF FACT AND TO RULINGS OF THE HEARING OFFICER.

Now come Thomas E. Keane and Paul T. Wigoda, pursuant to Rule 8 of the Rules of Procedure of the Credentials Committee of the 1972 Democratic National Convention and state the following exceptions to findings of fact and to rulings of the hearing officer, Cecil F. Poole.

1. The hearing officer committed serious error and deprived the parties of due process rights to fair hearings by refusing to convene hearings at a time at which the challenged delegates could present a defense on any date other than the date upon which all duly elected delegates to the Democratic National Convention were scheduled to be in Springfield, Illinois for a previously scheduled convention of the Democratic Party. Although the hearing officer was advised of the scheduled convention date long in advance of the time of his order wherein he set the date upon which challenged delegates could present evidence, he persisted in his order that no evidence could be presented other than on that date. Any court in the land would have permitted a continuance to a date upon which the challenged delegates could present evidence. The hearing officer here refused to consider a request for even a day's extension of time. The failure to provide adequate time for the presentation by the challenged delegates of a defense deprived them of due process rights to a fair hearing, tainted the proceedings with error and resulted in biased, distorted and erroneous findings.

2. The hearing officer violated all notions of due process in that he made no findings nor sought to make findings directed against any individual challenged delegate. Instead, the hearing

officer has, in effect, found them all guilty by association. Such innuendo, denunciation and findings are not characteristic of the Democratic Party. The hearing officer, in failing to make findings directed against individuals, has ignored the traditional concern of the Democratic Party for invidiual rights and individual liberties. His findings are characteristic of the type of charges made by members of the opposition party in the early 1950's.

3. The findings of the hearing officer ignore and violate the principle of free and open elections.

The hearing officer ignored the fact that the challenged delegates were elected to office in contested elections in which almost one million voters voted. There were no charges of fraud or wrongdoing in the election. No election contests were filed. Anyone could seek nomination and all registered voters were entitled to vote.

Considerable evidence was presented to the hearing officer concerning diligent attempts by the Cook County Democratic Organization and the other regular Democratic organizations throughout the area to register as many voters as possible to take part in Illinois elections. Voter registration extended throughout the various communities of Chicago, regardless of the race of the residents of said community. The hearing officer failed completely to comment upon the extensive registration drives and the free and open nature of the nominating and election process in Illinois. Such free and open election process and the attempts at registration seriously undermine the findings of the hearing officer.

4. The hearing officer failed to hear and consider the serious claims made concerning the alleged unconstitutionality of Guidelines A-1, A-2, C-4 and C-6, although requested to do so. Attached hereto and made a part hereof as Exhibits 1 through 7 respectively are Motion of Thomas E. Keane to Dismiss So-Called "Challenge", Answer of Thomas E. Keane to So-Called "Challenge", Motion of Paul T. Wigoda to Dismiss So-

Called "'Challenge", Answer of Paul T. Wigoda to So-Called "Challenge", Memorandum of Law with Respect to So-Called "Challenges" Against Thomas E. Keane and Paul T. Wigoda, pages 194 through 198 of the transcript before the hearing officer concerning motions to dismiss made prior to the taking of evidence, and pages 1412 through 1417 of the transcript relating to motions to strike certain evidence made at the conclusion of the presentation of evidence. The hearing officer's failure to consider the various legal issues raised therein seriously taint his findings and demonstrate the total inadequacy of the hearing insofar as this "challenge" is concerned.

5. The hearing officer has ignored the fact that in Illinois, where the Constitution and laws provide for free and open election of delegates to the National Nominating Convention of each party, the right to sit as a convention delegate is exclusively controlled by the Illinois Election Code.

6. The hearing officer has ignored the fact that the laws of the State of Illinois were enacted to enable said state to comply with the spirit of the present party rules by providing for the free and open election of delegates. If said laws conflict in any way with party rules, the laws supersede the rules insofar as the rules might (1) nullify a free and open election by the people of the State of Illinois, or (2) impose any racial, age or sex quotas, or (3) abridge rights of free speech and association.

7. In no event can Guideline C-4 apply in circumstances such as in Illinois where the laws of the State of Illinois (Ill. Rev. Stat. ch. 46, § 7-8) expressly provide for the election of party officials prior to the year in which the convention occurs. It is not necessary for duly elected party officials to resign their office in order to speak out or endorse candidates as would be required by Rule C-4.

8. The findings of the hearing officer serve to usurp the free and open election process. Acceptance of the findings of the hearing officer by the Credentials Committee will lead to a result contrary to the spirit of the party rules seeking more rather

than less participation. As stated in the Mandate for Reform, "The cure for the ills of democracy is more democracy." To disregard the results of a valid and open election wherein all members of the electorate could participate as voters or candidates certainly does not lead to a "more democratic" result but enables a small backroom group to determine rights to elective office.

WHEREFORE, Thomas E. Keane and Paul T. Wigoda respectfully pray that the Credentials Committee dismiss the challengers and confirm the seating of the delegates elected by the people of Chicago in a free and open election.

Respectfully submitted,

THOMAS E. KEANE and PANL T. WIGODA
By /s/ JEROME H. TORSHEN,
Jerome H. Torshen,
Their Attorney.

APPENDIX D

MIKE ROYKO, A HARD LOOK AT 'SINGER 59', *CHICAGO DAILY NEWS*, JULY 5, 1972

Dear Ald. Singer:

You are a spunky guy, Bill, and I like you. You served as a judge in my Penny Pitching Contest. There aren't many aldermen I would have trusted with all those coins.

I admire the way you stand up and tangle with the mayor at City Council meetings. In general, you are good, honest, true, as well as smart and energetic, although you could lose a few pounds.

So I hate to tell you this, but if I were a delegate in Miami Beach next Monday, I would vote to seat "Daley's 59," not your 59.

Not because I think they are better people. I admire many of your 59. Some are friends of mine. On the other hand, most of Daley's delegates would cheerfully string me up from a tree.

And not for reasons of political expediency, although I think Daley's outfit can generate more votes next November than your enthusiastic amateurs.

But I just don't see where your delegation is representative of Chicago's Democrats. And that is what this thing is really all about, since we are talking about the Democratic National Convention.

Take all of the talk about rules for reforming the party, opening it up to more people.

You claim to have done that with the "Singer 59."

About half of your delegates are women. About a third of your delegates are black. Many of them are young people. You even have a few Latin-Americans.

But as I looked over the names of your delegates, I saw something peculiar. It might not be noticeable to somebody from another part of the country, but it jumps out at a native Chicagoan.

There's only one Italian name there.

Are you saying that only one out of every 59 Democratic votes cast in a Chicago election is cast by an Italian?

And only three of your 59 have Polish names.

Does that mean that only 5 per cent of Chicago's voting Democrats are of Polish ancestry?

If that were true, a Republican would be mayor of Chicago.

Your reforms have disenfranchised Chicago's white ethnic Democrats, which is a strange reform.

Don't tell me that it shouldn't matter what a person's ethnic background is. If it is important to a black that he has a black representative, which it is, than it matters to Uncle Stanley that a pierogi-eater be out in front for him.

You can't sit down and decide to have this many black delegates, that many women, this many Chicanos, that many young people, then almost ignore the existence of white ethnic groups.

Oh, I guess you can do it. If you are goofy enough.

Not that Daley's delegation is perfect in this respect.

He still thinks there are more Irish than anyoody else in Chicago, so 16 of the Daley delegates are of that background. And he has only five women, and few Latin-Americans.

But he does have 10 Poles, 7 Italians, 5 Jews, a scattering of WASPS, Germans and those undefineable names known as "Americans," and 12 blacks.

While he doesn't have a perfect balance either, his delegates come much closer to reflecting the people who vote as Democrats in Chicago than yours do.

The other thing that bothers me about your delegation is that about half of it or more ran in the primary and got stomped.

Some didn't get enough votes to win a student council election in a one-room schoolhouse.

Yes, I know the Machine can do strange and wondrous things in the polling place. I know about the clever ways of the precinct captain, and that most of Daley's delegates are the bosses of their wards.

But if every precinct captain slept through primary day, your candidates would have still been counting their votes on their fingers and toes.

Do you really think the Machine would have to flex any of its muscle in the 5th Congressional District to prevent your Reginald Williams from defeating somebody named Richard J. Daley?

Or that without the prodding of payrollers, the many Poles of the 11th Congressional District would have abandoned somebody named Roman Pucinski for your charismatic Cathy Ann Grossmayer?

Your people ran—and they should get credit for it—but they lost. The only way they could have won would have been if none of Daley's people was on the ticket in the first place. And it is asking an awful lot, even in the name of reform, for Richard J. Daley to step aside for Reggie Williams.

It makes even less sense to me that some of your other delegates are people who didn't try to run in the primary. Your co-leader, Jesse the Jetstream, didn't make it to his local polling place. He's being hailed as a new political powerhouse and he couldn't deliver his own vote.

Now they are delegates, having been declared so by themselves, at meetings that were about as open as the Harvard Club. When Vito Marzullo showed up and called them "mother——," they were horrified. Heck, I heard thousands of young McCarthy and McGovern backers chanting "F—— You, LBJ," for hours at the 1968 convention, and some of them are today's reform delegates. Can't an old ward boss express himself, too?

In closing, Bill, forget what I said earlier about losing a few pounds.

Anybody who would reform Chicago's Democratic Party by dropping the white ethnic, would probably begin a diet by shooting himself in the stomach.

APPENDIX E.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

September Term, 1971

Civil 1320-71 and 1010-72

No. 72-1631

THOMAS E. KEANE,

vs.

NATIONAL DEMOCRATIC PARTY, ET AL.,
WILLIAM COUSINS, ET AL.,

Appellants.

Before: BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and MACKINNON, *Circuit Judge*.

ORDER.

On July 28, 1972, appellants filed a motion for emergency rule to show cause and for injunction. Counsel for the parties have filed responsive pleadings with respect thereto.

Whereas on July 7, 1972, the Supreme Court of the United States stayed the judgments of this court entered herein July 5, 1972, and

Whereas we think doubts suggested by appellees as to the scope of the stay entered by the Supreme Court should be resolved by interpreting the Court's stay as suspending the operation of the injunction issued by this court July 5, 1972,

The Emergency Motion for a rule to show cause is denied;

And whereas in light of the status of the proceedings in this case we think this court is not an appropriate forum for the initiation of new proceedings for an injunction based on intervening events in the courts of Illinois,

The Emergency Motion for injunction is also denied.

Supreme Court, U. S.
FILED
MAY 30 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSINS, ET AL., *Petitioners,*

v.

PAUL T. WIGODA, ET AL., *Respondents.*

On Writ of Certiorari to the Illinois Appellate Court

BRIEF AMICI CURIAE

For the Americans for Democratic Action, the Independent Voters of Illinois, and the National Women's Political Caucus

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1106

WILLIAM COUSINS, ET AL., *Petitioners,*

v.

PAUL T. WIGODA, ET AL., *Respondents.*

On Writ of Certiorari to the Illinois Appellate Court

BRIEF AMICI CURIAE

For the Americans for Democratic Action, the Independent Voters of Illinois, and the National Women's Political Caucus

---

We present this brief in support of petitioners with the consent of counsel for both petitioners and respondents.

We rely on petitioners' treatment of this Court's jurisdiction, of the opinions below, of the questions presented, of the constitutional provisions involved, and of the Statement of the Case.

INTEREST OF AMICI CURIAE

The Americans for Democratic Action (ADA), founded in 1947, is an organization of individuals devoted, *inter alia,* to the broadening of the national political parties and the political process generally, through the inclusion of minorities and women and through increased and timely participation of all citizens everywhere. Over the past quarter century, ADA has worked for the reform of both major political parties toward the end of greater public participation therein.

The Independent Voters of Illinois (IVI), the Illinois affiliate of ADA, founded in 1944 under the name Voters for Victory, is an organization of Illinois citizens devoted, *inter alia,* to the broadening of participation in political parties and the political process generally throughout the State of Illinois (and its political subdivisions) through the inclusion of minorities and women and through increased and timely participation of all citizens throughout the State. Some of petitioners' delegation are members of IVI.

The National Women's Political Caucus, founded in 1971, is an organization devoted to involving more women in the political process, especially through their election to office. Since many persons commence or further careers in elective politics by seeking to become delegates to the national political conventions, the openness to women of the process of selecting delegates is a matter of vital concern to the Caucus.

Amici Curiae view the decision below as a grave threat to the progress made over the years toward more open and democratic political parties and political processes.

ARGUMENT

This case presents the critical question of the relationship between state laws dealing with the selection of delegates to national party nominating conventions and the rules, procedures and decisions of the national party conventions themselves. *Amici* hold the view that the decision below that "the law of the state is supreme" (App. B-24) reverses our national political history directed toward more democratic political processes within the two major parties.

Over the years, the states have provided the mechanism for the selection of delegates, and as a general practice the national parties have accepted delegates chosen under the procedures laid out by the states. But the states may enforce their election laws only in ways not inconsistent with the right of the national parties, within federal constitutional limits, to formulate rules and procedures for, and to make decisions concerning, the selection of delegates to their national nominating conventions. National party rules, procedures and decisions concerning the selection of delegates to national party conventions obviously supersede state laws where conflicts occur; a contrary rule of law would surrender the necessary authority of the national parties in governing their national nominating systems to the mercies of 50 different state legislatures and their conflicting value judgments.[1]

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[1] This case presents only the question of state action in direct conflict with national party rules, procedures and decisions. A more difficult question *not* presented here is whether state substantive law purporting to govern the eligibility and qualifications of delegates to the national party conventions (as contrasted with the mere establishment of procedures for the selection of delegates) is binding even in the absence of conflict.

Far from validating such intrusion on the parties' prerogatives, this Court has gone so far as to free the delegate selection process of the national parties not only from review by state courts but even from its own review and supervision. In *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972), this Court refused to intervene, and refused to permit the Court of Appeals for the District of Columbia Circuit to intervene, in a credentials dispute pending before the Democratic National Convention involving a substantial federal claim of due process violation—the changing of the rules of the Party after the California election for delegates had been held—a claim which the Court of Appeals had upheld on the ground that the Party's action was "arbitrary and unconstitutional." In so doing, this Court relied upon the fact that "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." Or, as this Court also phrased it in its opinion, "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates should be seated." Certainly, since this Court deemed the federal judiciary barred from intervening in a credentials dispute at a national political convention even in a case where the Court of Appeals had found violation of the Federal Constitution, *a fortiori* state courts cannot intervene under state law. If the national nominating process is free of federal judicial review under federal constitutional law, much more does federal supremacy bar the intrusion of state court injunctive interference based on state law in conflict with national party action.

One could stop here; the decision at bar is governed by *O'Brien*. But this Court's action in failing summarily to reverse on the basis of *O'Brien* and in requiring full briefing of the case, would seem to justify *amici curiae* in setting forth the relevant history of the national political parties' actions in the selection of delegates as significant background for the decision of this case.

Amici wish to apprise the Court as to how the freedom of the national parties from the strictures of state law has been beneficial to the political development of the nation. The history of the Presidential nominating process has been a history of increasing public participation even when that necessitated the overriding of restrictive state law. The freedom of national parties from the obstruction of state law has brought greater democratic participation in the Presidential nominating process in many ways, three of which we review in this brief: (1) promotion of greater participation by minorities and women in the face of obstacles placed in their way by obstructionist state governments; (2) promotion of the development of a degree of loyalty to the Party whose candidate the delegates were choosing, thus developing a more cohesive and democratic party structure; (3) assistance to the ordinary citizen to find a place in the party against the closed, untimely, and otherwise undemocratic processes of political machines.

Before turning to an elaboration of these points, we should like to set forth one unique historical analogue for the present case. In August 1964, the Mississippi Freedom Democratic Party, largely black, challenged the delegation of the Mississippi Democratic Party at the Democratic National Convention on the ground that blacks had traditionally been excluded from all

participation in the "regular" or "traditional" Mississippi Democratic Party. On Wednesday, August 12, 1964, just prior to the Convention, Mississippi Chancery Court Judge Stokes V. Robertson, Jr., issued an order banning the Mississippi Freedom Democratic Party from using that name and its officers from functioning.[2] The injunction was issued at the request of the State.[3] The State's argument was that "the word Democratic already appears as part of another party and under state law a second group could not use it."[4] The state also complained that the Mississippi Freedom Democratic Party "did not lawfully organize, did not give proper notice of precinct meetings, county conventions and that, in fact, it was conceived in the minds of COFO [a civil rights organization] workers."[5] The main defendants were 10 Freedom Party leaders.[6] The following day, August 13, these Freedom Party leaders said they would proceed despite the court ruling.[7] The following week, Assistant Attorney General Rubel Griffin announced that he would file petitions against the delegates of the Mississippi Freedom Democratic Party citing them for contempt of court when they returned to the state.[8] "... we'll file our petition against the delegates just as soon as they return to the state."[9] But no such action was ever taken by the state; the

[2] The *Clarion-Ledger* (Jackson, Miss.), 8/13/64, p. 1A, col. 7.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] The *Clarion-Ledger* (Jackson, Miss.), 8/14/64, p. 1A, col. 5.

[8] The *Clarion-Ledger* (Jackson, Miss.), 8/19/64, p. 8A, col. 4.

[9] *Ibid.*

Mississippi Freedom Democratic Party delegates attended the Convention and participated in its proceedings to the extent permitted by the Convention. They returned to Mississippi and no action was taken against them. Apparently, Mississippi in 1964 was more willing to accept the action of the Democratic National Convention than Illinois in 1972.

From the very first presidential nominating convention held prior to the 1832 election, the political parties of the United States have made their own determinations as to who should be seated at those conventions.[10] It has been the right to make those determinations free of restrictive state law that has served the parties and the nation well. We turn now to an examination of three particular aspects of this history.

I

NATIONAL PARTY VINDICATION OF THE PUBLIC INTEREST IN ELIMINATING DISCRIMINATION IN THE POLITICAL PROCESS

In the years following the disenfranchisement of blacks after the close of Reconstruction, the only avenue in the southern states open to black participation in the presidential election process was the Republican Party. Indeed, the Republican Parties of many southern states were the only political vehicles blacks had at any level. In 1948 and 1952, the National Republican Party was able to protect this limited, but vital, oasis of black participation only because it could act independently of state laws.

In 1946, the Georgia legislature passed a law providing that the Georgia secretary of state would make the

[10] P. David, R. Goldman, R. Bain, *The Politics of National Party Conventions* (1960), 259-264.

final determination of national convention credentials disputes involving parties polling less than 150,000 votes in the preceding presidential election—i.e., the Republican Party.[11] At that time there were two Republican factions in Georgia: a biracial wing known as the Tucker faction and a white segregationist wing known as the Foster faction.[12] In 1948, the Foster group secured a ruling from the Georgia secretary of state that it should be seated at the national convention. Despite that authoritative determination made pursuant to state law, the National Republican Party concluded that the Tucker group was better representative of the party rank and file and seated the integrated delegation.[13]

In 1952, the Georgia segregationists again attempted to block the seating of the biracial Republicans, this time through a state trial court decision declaring the Foster faction to be the legal Republican Party in Georgia. But once again the national party made an independent determination and seated the integrationist Tucker group.[14]

A similar situation existed in the Republican Party in Mississippi, and manifested itself in a decision at the 1952 national convention to disregard state law in the interest of racial justice. Since 1928, there had been

[11] P. David, M. Moos, R. Goldman, *Presidential Nominating Politics in 1952* (1954) (cited as "David & Moos" hereafter), v. 3, p. 93.

[12] *Ibid.*, 91-92.

[13] *Ibid.*, 93.

[14] *Ibid.*, 94, 100-102; R. Bain and J. Parris, *Convention Decisions and Voting Records* (1973) (cited hereafter as "Bain & Parris"), 283-284.

two Republican parties in Mississippi. One group was known as the Black and Tans, a racially mixed party which had roots going back to Reconstruction and which traditionally had been seated by the national conventions. The other group was known as the Lily Whites, a rigidly segregationist group which emerged in 1928 in opposition to the Democratic candidacy of Governor Al Smith of New York.[15] In 1950, the Mississippi state legislature passed a bill which required political parties to register with the state, and which further stated that no one could claim to be a representative of a party without being selected according to the laws of the state and that no party could use in its title the name of any political party already registered in the state.[16] The Lily Whites registered immediately upon the signing of the statute into law, thus preempting the registration as Republicans by the Black and Tans.[17] The Mississippi Supreme Court upheld the statute and its application. *Hoskins* v. *Howard,* 214 Miss. 481, 59 So.2d 263 (1952). But despite this clear ruling of the highest court of the state, the Republican Convention seated the Black and Tans.[18]

[15] David & Moos, v. 3, pp. 211-212; Harold Leventhal, "The Law of National Party Conventions," New York Law Journal, August 25, 1964, pp. 1, 4 (cited hereafter as "Leventhal").

[16] Mississippi Code, Sec. 3107-01 - 3107-06).

[17] David & Moos, v. 3, p. 213; Leventhal, p. 4.

[18] David & Moos, v. 3, pp. 213-221; Leventhal, p. 4. A federal three-judge district court panel declared the name restriction to be unconstitutional in *Howard* v. *Lardner,* 116 F. Supp. 783 (1953), but was summarily reversed by this Court without opinion by a 5-3 vote. *White v. Howard,* 347 U.S. 910 (1954). However, the only issue raised in federal litigation was the right of the state to restrict the use of a party label within a state for state purposes.

The National Democratic Party (NDP) efforts in in this area, while more recent, are more substantial in undertaking to eliminate racial discrimination in its ranks. The success of the struggle for non-discrimination in the party has been due, in no small measure, to the right of the national party to make ultimate determinations as to who shall sit as delegates to its national convention and whom it shall recognize as the national party representative in a given state.

In addition to the systematic exclusion of blacks from virtually all electoral processes in Mississippi, by the middle 1960s the whites who dominated the state-controlling and state-recognized Democratic Party (Regulars) had a history of failing to support both the NDP ticket and the most basic principles of the national party. Developing their own delegate selection processes, a group of blacks and a few sympathetic whites formed the Mississippi Freedom Democratic Party (MFDP)—a party totally committed to the national policies and candidates of the NDP. The MFDP challenged the right of the Regular delegates to sit at the 1964 convention.[19] The state attorney general's office sought an injunction from a state court under the law the Lily Whites attempted to use to block the integrated Republicans in 1952. The court granted an injunction barring the MFDP from functioning, and the state threatened to have the MFDP delegates held in contempt for traveling to the national convention in an effort to replace the segregationist Regulars.[20] The regular Democrats resisted the MFDP challenge and demanded the Convention seats on

[19] Bain & Parris, 315.

[20] The *Clarion-Ledger* (Jackson, Miss.), 8/13/64, p. 1A, col. 7; 8/19/64, p. 8A, col. 4.

grounds of state law. But the Convention imposed an historic compromise totally unrelated to state law. The Convention demanded a pledge of party loyalty from any "Regular" prior to seating (most refused and were not seated), offered the MFDP two delegates-at-large in the Convention, and proclaimed a party commitment not to permit such racial abuses in the future.[21]

Following the 1964 presidential election, the Democratic National Committee (DNC) acted on the Convention's anti-discrimination mandate and created the Special Equal Rights Committee. The Rights Committee's first report, issued in April 1966, gave notice to all state parties that failure to comply with standards of non-discrimination would mean "forfeiture of the right to be seated" at the 1968 Convention.[22] In January 1968, the DNC adopted the recommendations of Rights Committee Chairman Gov. Richard J. Hughes of New Jersey, recommendations known as the "Six Basic Elements."[23] The Six Basic Elements included requirements that all public party meetings be open to Democrats on a non-discriminatory basis; that no membership tests be based on support of racial, religious, or ethnic discrimination; and that all party processes be open to broad participation.[23a]

[21] Bain & Parris, 315.

[22] Cited in Schmidt and Whalen, "Credentials Contest at the 1968—and 1972—Democratic National Conventions," 82 Harv. L. Rev. 1438, 1450 (1969).

[23] *Ibid.*, 1450-1.

[23a] Cited in Commission on Party Structure and Delegate Selection, "Mandate for Reform" (1970), p. 39. This report, popularly known as the McGovern Commission Report, is reproduced in the Congressional Record, v. 117, part 25, pp. 32908-32921 (9/22/71).

In 1968, the national party determined that the Mississippi Regulars had not lived up to party requirements of non-discrimination, and seated the delegates of the well-integrated MFDP, recognizing it as the representative of the National Democratic Party in the state of Mississippi. This was done despite the fact that the unseated Regulars were chosen by the party organization recognized under state law.[24]

In the next four years, the Mississippi seats on the DNC were held by the MFDP (by now, popularly known as the Loyalists), and the Loyalist delegation was placed on the temporary roll of the national convention in 1972.[25] The Loyalists selected their delegates in a process that attempted to conform with the Mississippi statutory plan, which provided for a tiered-delegate selection process, beginning at the precinct level at the "regular voting places" on a particular date.[26] The Loyalists were unable to comply with all aspects of the relevant statute because, among other reasons, the Loyalists were denied certification by the secretary of state of Mississippi to use the regular voting places.[27] This denial was again based on the Mississippi party registration statute which barred the Loyalists from registering as the Democratic Party of Mississippi.

In late April 1972, after attempts by the Loyalists to work out a compromise with the Regulars had broken down, the Regulars brought suit in federal court against both the Loyalists and the national party to block seating of the well-integrated Loyalists at the national convention on the ground that the Regulars' delegates, and only the Regulars' delegates, had been chosen to attend the Democratic National Convention in accordance with state law.[28] Although the court declared that the "Regular faction is the legal, official Democratic Party of the State of Mississippi, and that the Loyalist faction is not," it refused to grant the injunction sought by the Regulars, requiring only that the Regulars be given a fair hearing at the national convention.[29] That hearing was given, the Loyalists were seated, and the court rejected the Regulars' subsequent motion to enjoin the Loyalists, noting that "the National Democratic Party is a political organization, having no statutory rules or regulations to follow, but only the rules made by its own membership."[30]

Thus the national party continued to support the principle of meaningful black participation by continuing to recognize the integrationists in the presidential nomination process in the state of Mississippi. Had state law been controlling, that result would have been impossible.

The national party dealt with a similar situation of racial discrimination in the selection of the Georgia delegation in 1968. In Georgia all the delegates were picked by two men—Gov. Lester G. Maddox and state executive committee chairman James H. Gray—per an authorization from the state convention that was held two years prior to the national convention.[31] A challeng-

[24] Bain & Parris, 323.

[25] The underlying facts on the Mississippi seating in 1972 are set out in *Riddell v. National Democratic Party*, 344 F. Supp. 908 (S.D. Miss., 1972).

[26] 344 F. Supp. at 921.

[27] *Ibid*, at 914.

[28] *Ibid.* at 910.

[29] *Ibid.* at 922.

[30] *Ibid.*

[31] Bain & Parris, 324; see *Smith* v. *State Executive Committee of the Democratic Party of Georgia*, 288 F. Supp. 371, 376-7 (N.D. Ga., 1968).

ing group, led by black state representative Julian Bond, charged that blacks had been systematically discriminated against. The Convention agreed with the challengers' allegations and decided to split the delegation between the two contending groups.[32]

The Georgia party had acted under authority granted by state statute, and its delegate selection procedure had been upheld against an attack on its constitutionality only days before the opening of the national convention.[33] Yet the national party, exercising its constitutional right of freedom of association, seated delegates from that state it believed to be more representative of its constituency and ideals, and in so doing, fostered black participation from Georgia. And the national party's decision had its salutary effect: The Georgia delegation to the 1972 national convention, chosen in accordance with the new party rules (discussed, *infra,* pp. 15-16) contained a true cross-section of Democrats from that state—blacks, including Rep. Bond, and whites, including Maddox's successor in the statehouse, James Carter.[34]

The 1972 Georgia delegation and those of the other states were far more reflective of the NDP's black constituency than the delegations to previous conventions. Overall, the proportion of blacks increased from 5 per cent in 1968 to 15 per cent in 1972.[35] This resulted in

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[32] Bain & Parris, 324.

[33] *Smith* v. *State Executive Committee, supra;* Code Ga. § 34-902.

[34] *Washington Post,* 6/29/72, p. A12, col. 1; *Atlanta Constitution,* 7/11/72, p. 1-A, col. 3.

[35] See *"Let Us Continue . . .", A Report on the Democratic Party's Delegate Selection Guidelines,* Americans for Democratic Action, p. 18 (based on U.S. Census and CBS surveys).

large measure from national party rules requiring state parties to "overcome the effects of past discrimination by affirmative steps to encourage minority group" participation and representation, and especially by shifting the burden of proof concerning such steps to the challenged party when minorities, women, and young people were not represented "in reasonable relationship to the group's presence in the population."[36] With the exception of the challenge involved in the instant case and delegations from two counties in New Jersey,[37] no delegations were restructured for having failed to conduct effective affirmative action programs to involve racial minorities. This great success was due to a significant degree to the awareness of the state parties that such restructuring could have been made if they did not work to open their doors to blacks.[38]

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[36] Mandate for Reform, 40; Memorandum on "Representation of Women, Young People and Minorities on National Convention Delegations," Commission on Party Structure and Delegate Selection, dated December 9, 1971 (on file in the office of the Commission's chairman, Congressman Donald M. Fraser). These requirements led, in addition to the above-mentioned increase in the proportion of black delegates, to an increase from 1968 to 1972 of Spanish-speaking delegates from 1 per cent to 5 per cent, of women from 13 per cent to 40 per cent, and of young people from 4 per cent to 21 per cent. See, *"Let Us Continue . . .",* supra, n.35.

[37] See, ". . . of the People: Report of the Credentials Committee to the 1972 Democratic National Convention," 18-19, 41 (on file with the Democratic National Committee).

[38] The Guidelines explicitly barred the mandatory imposition of quotas. *Mandate for Reform,* 40. Thus, the issue before the Convention was not whether a given delegation had "enough" blacks or women or young people, but rather whether the state party had taken steps to encourage their involvement and could, if challenged, meet the burden of proof that they had done so.

The NDP has continued with this overall policy in its guidelines for the 1976 convention. Guideline 18A states that "[i]n order to encourage full participation by all Democrats, with particular concern for minority groups, Native Americans, women, and youth, in the delegate selection process" the various state parties "shall adopt and implement Affirmative Action Programs . . . to encourage such participation." [39] Failure to do so, according to Guideline 19G, "shall constitute grounds for a challenge *with* the burden of proof *on* the challenged party." [40] Thus, the party's ability to continue enforcement of efforts to involve these groups is contingent on its freedom to make the final decisions, within federal constitutional guidelines, on the seating of delegates.

The events set in motion by the MFDP in 1964 led to a series of commitments by the National Democratic Party on various governmental levels and within its own ranks to bring blacks into the mainstream of American political life. The national party made a commitment to racial equality and made it stick. And perhaps even more significantly, the commitment of the Democratic Party, galvanized by the events of 1964, facilitated the subsequent support by its presidential nominee after his election of the sweeping Voting Rights Act of 1965, which has brought such great and positive changes in the southern states.

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[39] "Report of the Commission on Delegate Selection and Party Structure as Amended and Adopted by the DNC Executive Committee," dated March 1, 1974 (on file at the Democratic National Committee.)

[40] *Ibid.*

II

NATIONAL PARTY VINDICATION OF THE PUBLIC INTEREST IN COHERENT NATIONAL ENTITIES ABLE TO PLACE PRESIDENTIAL CANDIDATES ON THE GENERAL ELECTION BALLOT WITH ASSURANCE THAT THE VOTERS CAN SUPPORT THE CANDIDATE OF THEIR CHOICE

Of vital importance to any national party is its ability to enforce some minimal degree of loyalty among the representatives of its adherents from the several states, and its ability to assure that its affiliated state parties will place its presidential ticket, appropriately identified and with pledged electors, on the general election ballot so that the voters may make an effective choice among the presidential nominees. The health of our existing electoral system is based in large part on the health of the major parties, and their ability to maintain some degree of coherence.

The maintenance of unity and coherence in party principles and procedures has been a problem for the National Democratic Party in recent decades. In order to assure that its supporters and potential supporters in the country will have the opportunity to vote for its presidential and vice presidential candidates, and that those candidates are able to run under the national party label, the Democratic Party has found it necessary to set some minimum standards of party loyalty and to enforce those standards at its national conventions.

The Democratic loyalty problem stemmed from the widening chasm in the late 1930s and 1940s between traditional Democratic organizations in the southern states and the rest of the party over a number of social

issues. In 1944, that chasm manifested itself in the Texas State Democratic Convention by "a series of resolutions declaring that the Texas electors would not be bound to support the nominees of the national convention unless certain demands were met."[41] Not only did the state convention threaten to withhold support from the national ticket, but it also selected presidential electors who were not pledged to vote for the national ticket, thereby proposing to prevent Texans from even voting for the presidential and vice presidential nominees of the NDP. The delegates chosen at the state convention were challenged by a delegation selected by Texas Democrats who had left the duly-authorized state convention rather than go along with the anti-national-party actions. The Credentials Committee decided that both should be seated, and the Convention upheld that decision over the Regulars' objections.[42]

In this instance, despite the fact that the Texas State Democratic Convention was the meeting authorized by state law,[43] the NDP sought to deal with an internal state party dispute based on clear issues of national party loyalty by disregarding state law in seating delegates. The compromise solution was successful; after the national convention, the Texas convention met again

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[41] Bain & Parris, 265; A. Holtzman, "The Loyalty Pledge Controversy in the Democratic Party," from *Cases on Party Organization*, P. Tillet (ed.) (1963), 124 (cited hereafter as "Holtzman").

[42] Bain & Parris, 265.

[43] See Vernon's Revised Civil Statutes of the State of Texas, Election Code, art. 13.58.

and selected electors committed to the Roosevelt-Truman ticket.[44]

In Mississippi that same year of 1944, the state convention voted to free its electors from an obligation to vote for the national ticket if certain similar demands were not met. A few days before the election, three electors announced they would not vote for Roosevelt-Truman, but the state legislature quickly provided for the inclusion of a loyal Democratic slate on the ballot.[44a] In both Texas and Mississippi, the national ticket won easily.

By 1948, the loyalty split in the party had become wider. Several southern Democratic parties sent delegates with "restricted credentials," that is, instructions to walk out of the convention if either the platform or the nominees were unacceptable.[45] The southern delegations were seated as offered by the respective states parties,[46] but the Mississippi and half the Alabama delegates walked out of the convention.[47] The walkout led to the formation of the States' Rights Party which ran Strom Thurmond (then Democratic governor of South Carolina, now a Republican senator from that state) for president and Gov. Fielding Wright of Mississippi for vice president.[48]

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[44] The final result was that in Texas the electors labeled as Democrats were committed to the national ticket, while the earlier selected unpledged electors ran under the title "Texas Regulars" (Holtzman, 124).

[44a] Holtzman, 124-125.

[45] Holtzman, 125.

[46] Bain & Parris, 273.

[47] The walkout followed the adoption of the Humphrey-ADA strong civil rights plank. Holtzman, 125.

[48] *Ibid.*

Many prominent southern politicians supported the walkout, and in Mississippi, South Carolina, Louisiana, and Alabama the state Democratic electors were pledged not to the Truman-Barkley ticket chosen by the national convention, but rather to the Thurmond-Wright ticket. Although loyal Democrats were able to get the national party candidates on the ballot (albeit not under the Democratic label) in three of the four states, in Alabama the state party bolt produced a situation in which the Truman-Barkley ticket was nowhere to be found on the ballot in November. The States' Rights ticket won the electoral votes of all the states in which it ran under the Democratic label and only of those states.[49]

Loyal Democrats subsequently gained control of the state party organization in Alabama and, under broad authority granted the state committee by a state statute, required voters to pledge support of the national ticket as a prerequisite to participation in the primary election for presidential electors. The pledge was upheld by this Court in *Ray* v. *Blair,* 343 U.S. 214 (1952).

In response to the 1948 desertions, the 1952 Convention resolved that no delegate could be seated without giving

> assurance to the Credentials Committee that he will exert every honorable means available to him in any official capacity he may have, to provide that the nominees of this Convention for President and Vice President, through their names or those of

[49] *Ibid.* One elector from Tennessee also voted for the States' Rights ticket. National Committee members from Alabama, Louisiana, Mississippi and South Carolina supported Thurmond and Wright, and the DNC declared their seats vacant.

> electors pledged to them, appear on the election ballot under the heading, name or designation of the Democratic Party.[50]

The Moody Resolution, as it was known, further stated that

> for this Convention, *only,* such assurances shall not be in contravention of the existing law of the State, nor of the previous instructions of the State Democratic governing bodies.[51]

Thus, the 1952 Convention asserted its right to determine the applicability of state law: a state law could not *compel* the party to seat a delegation not deemed by the convention to be in compliance with minimal requirements of party loyalty. As a result, the national ticket was on the ballot under the Democratic label in every state in 1952.

The DNC dropped the Moody Resolution from its Call to the 1956 Convention, but put in its place a resolution which required a degree of adherence by state parties and delegates to a minimal party standard. First, the resolution stated that it was

> the understanding that a State Democratic Party, in selecting and certifying delegates to the Democratic National Convention, thereby undertakes to assure that voters in the State will have the opportunity to cast their election ballots for the Presidential and Vice-Presidential nominees selected by said Convention, and for electors pledged formally or in good conscience to the election of these Presidential and Vice-Presidential nominees, under the Democratic Party label and designation.[52]

[50] Quoted in Bain & Parris, 288.

[51] *Ibid.* at 289, emphasis added.

[52] Quoted in *Comment,* "The Democratic Party's Approach to Its Convention Rules," 50 Am. Pol. Sci. Rev. 553 (1956).

The resolution went on to state the assumption that all delegates certified by state committees were "bona fide Democrats" who would "participate in the Convention in good faith," but noted that "no additional assurances" would be required "*in the absence of credentials contest or challenge.*" [53] Thus the Party required not only a pledge of fair ballot position for the Convention nominees, but also went on record as holding that if delegates were otherwise demonstrably disloyal to the national party, they could be refused their seats in the event of a challenge, regardless of state law.

The 1956 Convention rejected challenges to the Mississippi and South Carolina delegations upon assurance from those delegations that they were in accord with the loyalty resolutions.[54] And again in 1956, the national ticket was on the ballot under the Democratic label in every state.

But following the 1956 election, the conflict was renewed between the southern leadership and the rest of the party over fundamental policies. Georgia and Arkansas passed laws allowing "state parties to 'free' electors from any party responsibility to the nominees of the national conventions," [55] and the Alabama state committee repealed its rule that participants in the state primary for the selection of party electors pledge themselves to support the national ticket.[56] The May 1960 Alabama primary resulted in the election of six

[53] *Ibid.*, emphasis added.

[54] Holtzman, 148-9.

[55] *Ibid.*, 150.

[56] See *supra*, at p. 20.

"unpledged" Democratic electors and five loyalist electors.[57]

The 1960 national convention avoided any battles over seating of southern delegations, but following the Convention the Mississippi State Executive Committee endorsed a slate of unpledged electors under the Democratic label, leaving the Kennedy-Johnson slate on the ballot without the Democratic designation. The Democratic ticket won the 1960 presidential election, but the eight Mississippi Democratic electors and the six Alabama Democratic electors not pledged to Kennedy-Johnson cast their votes for Sen. Harry F. Byrd, Sr., of Virginia.

The challenge brought by the MFDP at the 1964 Democratic National Convention has already been discussed (pp. 5-7, 10-11). The MFDP stressed that the Regulars had not complied, and could not be expected to comply, even with the minimal requirements of party loyalty contained in the 1956 resolution that had been carried over to succeeding conventions. The MFDP cited repeated statements and actions by state party bodies and officials over the years and up to that time withholding support from the national ticket and totally dissociating itself from national party policies.[58] The Credentials Committee worked out a compromise which seated the Regulars, provided they signed a pledge to support the national ticket and made an effort to get their state's presidential electors to vote for it.[59] A similar disposition was made of a challenge to the

[57] Holtzman, 150-1.

[58] MFDP Brief to 1964 Democratic National Convention (on file with Democratic National Committee).

[59] Bain & Parris, 315.

Alabama delegation. All but four of the Mississippi delegates walked out of the Convention; eleven of the Alabama delegates signed the oath, but the rest left the Convention.[60] In the general election, the Alabama Democratic electors ran in an unpledged status; no electors pledged to the national Democratic ticket were able to secure placement on the ballot.

The 1964 election produced defections to the Republican ticket on the part of a number of erstwhile southern Democratic leaders. These defections were part of the basis for the national party's decision at the 1968 Convention to recognize the Loyalists as the true representative of the NDP in Mississippi. Similarly, the fact that the Regular Georgia delegation had been directly selected by two men who had supported the Republican presidential candidate in the previous election was a factor in the national convention's determination of that challenge. In splitting the convention seats between the two contending groups, the Convention required the signing of a pledge by each delegate that he or she would support no presidential ticket other than the Democratic and would "take all necessary steps" to have the Democratic ticket placed on the ballot in Georgia.[61]

In 1968, both the Mississippi and Georgia Regular delegations were chosen pursuant to state law. The Georgia system had been upheld against an attack on its constitutionality shortly before the opening of the convention. Yet the national party, exercising its constitutional prerogative of freedom of association, seated delegations from those states it believed to be more

[60] *Ibid.*, 315-6.

[61] *Ibid.*, 324.

representative of the constituency and principles of the National Democratic Party. Had state law been interposed, the party's ability to represent and shape its constituency would have been nullified by the laws of the individual states.

III

NATIONAL PARTY VINDICATION OF THE PUBLIC INTEREST IN HAVING OPEN, DEMOCRATIC, AND REPRESENTATIVE DELEGATE SELECTION PROCESSES

It is a basic tenet of the American political system that for government to be responsive to the people, its highest officials must be selected by the people. Technicalities of the Electoral College notwithstanding, the voters of the United States do select their President. But as a practical matter, the public's choice is limited to the nominees of the major political parties. Therefore representative selection of our highest official requires that the party nominees be selected through democratic procedures. It is in the highest public interest that the major parties be able to assure that their delegates to national nominating conventions are truly representative of the party constituencies.

State statutes provide frameworks within which the convention delegates are chosen. As a general rule, delegates so selected—particularly when selected by direct election—are recognized by the national parties. However, as shown above in the areas of minority and woman participation and party loyalty, acceptance of those results would frequently have been destructive of fundamental principles of political freedom and party integrity. But even when matters of discrimination and party loyalty were not at issue, the parties

occasionally have had to act contrary to state law when the established procedures were abused or when such procedures proved inadequate to assure representative delegations.

The Republican experience in Texas in 1952 is instructive in this regard. National convention delegates were selected at the state party convention held pursuant to state law. Texas law also provided that the delegates to the state conventions were to be selected at precinct and county conventions.[62] Republican supporters of the presidential candidacy of General Eisenhower had been in the majority in many of the precinct and county conventions, but a large number of the results of those conclaves were rejected by the Republican State committee, which was controlled by supporters of Senator Robert Taft, on the ground that the Eisenhower delegates were really Democrats. The unseated Eisenhower delegates held their own state convention, and two delegations came to the national convention: A Taft-dominated slate chosen at the official state convention held pursuant to state law and an Eisenhower-dominated delegation chosen at the rival convention. The Taft delegation asserted that state law was controlling; the Eisenhower delegation charged that they had been wrongly excluded from the state convention. The Republican National Convention agreed with the Eisenhower position, and seated the Eisenhower delegation.[63] In this instance, the Republican National Party made the most fundamental of political determinations: the determination of who is a Republican. If state law had been allowed to control, the Convention would have

[62] David & Moos, v. 3, p. 320.

[63] *Ibid.*, 320-330.

been forced to seat the Taft delegation or possibly none at all, despite the national party determination that the Eisenhower delegation was indeed the delegation selected under the fairer and more representative process.

The Republican experience in 1952 was not the first reversal by a national convention of a boss-ridden delegate selection process. In 1880, the controlling group in the Illinois Republican convention disregarded choices made by several district caucuses and seated its own allies instead. But the national convention refused to seat the delegation as offered by the state party, and seated the delegates chosen freely in the district caucuses in place of those undemocratically appointed.[64]

The 1952 Republican Convention overruled the determination made by Texas party officials, acting under authority of state law, that the delegate selection procedures had been "raided" by the opposition. The 1908 Democratic Convention had faced a somewhat similar problem. A charge was made that five delegates from Philadelphia, Pennsylvania, had been selected in a state primary in which a minority Democratic faction had successfully conspired with Republicans to "raid" that primary, and that therefore the resulting delegates were not truly representative of the Democrats of that city. The objective evidence supporting the charge included the fact that in one of the affected districts the primary vote had been 2.7 times higher than the average turnout. The Convention agreed with the challengers, and the raid-produced delegates were unseated in favor of those who the party determined would have won had the process not been invaded by the opposi-

[64] Bain & Parris, 112.

tion.[65] The problem of raiding is ever present, most particularly in states holding "open primaries" where one need not be a registered party adherent to vote in that party's primary. Although the parties have not sought to overturn the results of such primaries since 1908, they should not be compelled to accept them.

Closed and unrepresentative processes have plagued both parties through the years. For example, the 1912 schism in the Republican Party between the supporters of William Howard Taft and Theodore Roosevelt may be attributed in large part to the inability of the delegate selection processes in many states to produce representative delegations.[66] But such problems have not been restricted to the conventions of 20, 60, and 100 years ago.

The events leading up to the Democratic National Convention of 1968 demonstrated that then-existing state-mandated procedures might not be adequate to assure representative delegations. The controversy in the Democratic party that year over the Vietnam War —a controversy that did not take the form of an open and substantial split over the presidential nomination until the March New Hampshire primary—highlighted these inadequacies. Delegate selection processes that began two or more years prior to the convention, that were unpublicized, that gave incumbent groups unfair advantages, that were malapportioned, that shut out widely-shared viewpoints, that discouraged the participation of important groups in the party's constituency, and/or that were open to various forms of abuse seri-

[65] Bain & Parris, 175-6.

[66] See Bain & Parris 178-179.

ously damaged the party.[67] The danger to the party was so great that the National Convention resolved to set standards for the future selection of delegates and authorized the establishment of a party commission to develop those standards.[68]

In February 1969, in accordance with the mandate of the national convention, DNC Chairman, Sen. Fred Harris of Oklahoma, appointed the Commission on Party Structure and Delegate Selection, popularly known as the McGovern-Fraser Commission.[69] The McGovern-Fraser Commission conducted extensive research into the delegate selection process and held hearings all over the country before promulgating its guidelines in November 1969.[70] The guidelines were designed to eliminate or modify three frequently overlapping categories of irregularities discerned during the Commission's investigations: structural inadequacies, procedural abuses, and discrimination (see pp. 7-16, *supra*). Included in the first category—structural inadequacies—were prohibitions against delegation selection beginning before the calendar year of the convention, selection of more than ten per cent of the

[67] These problems in the delegate selection process were catalogued just prior to the 1968 Convention in the Report of the Commission on the Democratic Selection of Presidential Nominees a group formed by various party leaders. The Report is reproduced in the Congressional Record at v. 114, part 24, pp. 31544-31560 (10/14/68).

[68] Eli Segal, "Delegate Selection Standards: The Democratic Party's Experience," 38 Geo. Wash. L. Rev. 873, 879 (1970).

[69] So named for its first and second chairmen, Sen. George S. McGovern of South Dakota and Rep. Donald M. Fraser of Minnesota.

[70] Segal, 879-880.

delegation by committee systems, intrastate apportionment on the basis of anything other than population or Democratic strength, the assessment of any cost or filing fee in excess of ten dollars, and ex-officio delegates.[71]

To remedy procedural abuses, the unit rule, proxy voting, secret caucuses, and closed slatemaking, among others, were proscribed. Concluding that these abuses were usually caused by the absence, unavailability or inadequacy of party rules explaining the delegate selection process, the Commission required the adoption of state-wide party rules which would explicitly set forth the details of these processes.[72] The Guidelines were accepted by the DNC in February 1971 and were incorporated into the Call for the 1972 Convention.[73]

The Commission recognized that in some instances existing state statutes might preclude compliance with certain Guidelines. However, the Commission did not permit such statutes to be defenses to violations. Rather, the Commission required that when state law was in opposition, state parties would have to "make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose."[74] Thus, unless a state party made such efforts, an obstructing state law would not be a defense to a challenge.[75]

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[71] *Ibid.*, 880. This last prohibition was modified by the National Committee to allow for the automatic seating of members of the National Committee. *New York Times*, 2/20/71, p. 1, col. 6.

[72] Segal, 880-881.

[73] *New York Times*, 2/20/71, p. 1, col. 6; The Call for the 1972 Democratic National Convention, pp. 12-13.

[74] Mandate for Reform, pp. 40, 41, 44-48.

[75] On July 16, 1971, the Commission adopted standards by which the "all feasible efforts" requirement would be measured. These included the introduction and active support of appropriate legislation, institution of litigation where constitutional issues might be involved, and use of party rules to cancel out the effects of non-complying statutes, where such action would be within the statute. (Document on file in office of Rep. Donald Fraser).

Some state frameworks were quite specific as to how delegates were to be selected; others gave the state parties considerable freedom, making specific legislative determinations that the state party organizations were to set up the processes. But whatever degree of specificity in the law of a state, it was clear that a delegation chosen in conformity with state law could at the same time violate a party rule that was designed to maximize representation and further the political associational goals of the national party. Thus, the use of the unit rule at precinct, county, and state levels of a state-mandated caucus/convention delegate selection process—done without violating state law—would justify the national party in restructuring the state's delegation in a way that fairly reflected the division of presidential preferences of the rank and file. Failure adequately to inform the public of key stages in the delegate selection process might not be a violation of state law, but would justify the national party in fashioning a remedy. And, similarly, a delegation chosen by a party body selected two years prior to the holding of the national convention might be chosen in accordance with state law, but would warrant action by the national party to assure a timely-selected delegation reflecting current constituency sentiment.

The NDP proved in 1972 to be in earnest in its desire to have the delegates to its presidential nominating convention selected in open and democratic processes designed to maximize participation of the party rank

and file. In general, state parties either reformed their own systems within the context of permissive state statutes or secured the necessary changes in state laws.[76] In many instances the power of the national party to refuse to seat delegations that were not selected in conformity with its rules was the key factor in securing compliance. Without that authority, a state party organization fearful of the effect of reform on its own power, could simply have ignored these democratic reforms. Since substantial compliance was by and large secured with the exception of the challenges to delegates from Illinois, the Convention found it necessary to make only a few minor adjustments in the delegations selected according to the state-mandated procedures.[77]

How the national party's freedom from the restrictions of state law facilitated a convention more representative of the rank and file of the party may be demonstrated by focusing on the party's 1972 experience with two state delegations, Maryland and Michigan. Party delegate selection Guideline B-7 required that in states in which delegates were elected in primaries by districts, the delegates be apportioned among those districts by a formula "giving equal weight to total population and to the Democratic vote in the previous presidential election" as a means of assuring that Democrats be represented on a rough one-person, one vote basis.[78] The Maryland delegate selection statute, however, provided that an equal number of delegates would be elected from each congressional district,[79] even

[76] See generally, "*Let Us Continue . . .*"

[77] See ". . . of the People: Report of the Credentials Committee to the 1972 Democratic National Convention," *supra*, n.37.

[78] Mandate for Reform, 45.

[79] Code Md. 1957, art. 33, §§ 12-1(a), 12-2.

though national party support was not uniform throughout the state. A Credentials Committee hearing officer conducted a hearing and concluded that the state party had not made "all feasible efforts" to bring the state law into compliance.[80] Faced with this finding, the leaders of the delegation (including the Democratic governor and lieutenant governor) had to reach a settlement with the challengers: the delegations from the underrepresented districts (the predominantly black 7th district in Baltimore and the liberal 8th district in the suburbs of Washington, D.C.) would select additional delegates to bring them to the number mandated by the party rule, while the votes of delegates from the overrepresented rural 1st, 4th, and 6th districts would be correspondingly reduced to fractional votes. The settlement was accepted by the Credentials Committee and the Convention.[81] It was equitable, yet it was contrary to the existing Maryland state law.

Michigan law provided for a presidential preference primary, followed by congressional district conventions, at which delegates would be selected among those committed to vote for the various presidential candidates in proportion to those candidates' vote in the primary.[82] However, in Michigan's 17th district, the delegates chosen to fill the slots won by the candidacy of George C. Wallace were not bona fide supporters of Wallace. The Michigan party leadership, and the state presidential campaign organizations of the other major

[80] Hearing Officer Fisher's Report on the Challenge to the Maryland Delegation to the 1972 Democratic Convention (on file at DNC).

[81] ". . . by the People," *supra*, 11. *Washington Post*, 6/29/72, p. B3, col. 6; 7/2/72, p. B1, col. 8; 7/3/72, p. B1, col. 6. M. Barone, G. Ujifusa, D. Matthews, *The Almanac of American Politics 1974* (1973), pp. 417-432.

[82] Mich. Comp. Laws Ann. 168.613 *et seq.*

presidential candidates, all agreed to support a challenge to those delegates. The Credentials Committee upheld the challenge and the challenged delegates from the 17th district were replaced with legitimate supporters of the Alabama governor.[83] This was a decision made by the party in the interest of having delegates who truly represented the expressed candidate and ideological preferences of the voters, and in the interest of maintaining party unity. Yet, had state law been controlling, the state party of Michigan and the national convention would have been powerless to rectify the situation, beyond possibly eliminating part of the 17th district's representation altogether.

The Democratic Party's 1972 rules went a long way toward making its convention truly representative of the party constituency. Those rules, however, permitted the use of state-wide winner-take-all primaries, wherein the presidential candidate receiving a plurality of votes (no matter how small a portion of the total vote it may be) wins all the delegates.[84] Winner-take-all often served to block out representatives of large segments of a party.

The winner-take-all system was first used in California in 1912. At that time the Republican National Convention had a standing rule, originally adopted in 1880, that delegates should be elected at the congressional district level.[85] Under California law, the state-wide victory of Theodore Roosevelt over William Howard Taft netted Roosevelt every California delegate. But

[83] ". . . by the People," pp. 51-52; *Washington Post*, 7/3/72, p. A4 col. 5.

[84] Party Guideline B-6 merely urged, but did not require, that such systems be eliminated. Mandate for Reform, p. 44.

[85] Bain & Parris, 123.

Taft had received the plurality in a San Francisco district and, in accordance with the national party's rule, the Convention seated the two Taft delegates from that district rather than those of Roosevelt.[86] The result as modified by the Convention was more reflective of the Republican constituency in California than was the state-mandated allocation of delegates, and was fully consistent with a long-standing Republican party rule.

At their convention in 1916, the Republicans decided to amend the rules to provide that delegates could be chosen entirely from a state at large and in conformity with the laws of the state.[87] One of the ramifications of the issue that the instant case presents to this Court is whether the Republican, Democratic, or any other national party should be compelled to take the course taken by the Republicans in 1916.

In fact, the 1972 Democratic National Convention mandated that in 1976 the Call should include the requirement that delegates be selected "in a manner which fairly reflects the division of preferences expressed by those who participate in the presidential nominating process."[88] Guideline 11 of the party's delegate selection rules for 1976 follows the mandate of the Convention by barring state-wide winner-take-all primaries.[89] The California winner-take-all primary, if still in effect in 1976, clearly would be inconsistent with party rules. The voters and candidates in California

[86] P. David, R. Goldman, R. Bain, The Politics of National Party Conventions (1960), 262.

[87] *Ibid.* at 196.

[88] Convention Proceedings quoted in Bain & Parris at 334.

[89] "Report of the Commission on Delegate Selection and Party Structure as Amended and Adopted by the DNC Executive Committee," *supra*, n.39.

in 1976 will be on notice that the Convention will modify a winner-take-all result, and such a treatment, in the context of clear party rule, would be wholly equitable, and, indeed, more representative than the allocation provided by the present state law. But under the view advanced by the respondents in this case, the National Democratic Party and the Democrats of California could be prevented from providing for such an equitable distribution.

State laws applicable to the delegate selection process are not always adequate for producing delegations that are representative of the party rank and file. In those situations where they are not, it is in the public interest for the national parties to have the freedom to fashion remedies.

CONCLUSION

The Illinois Appellate Court's ruling that "the law of the State is supreme" (App. B-24) would turn back the clock to a bygone era and undo the long and beneficial history of national party developments described above. The process of nominating candidates for election as our Nation's Chief Executive is too important to be left to the mercies of state officials too often subject to undemocratic pressures. We respectfully submit the decision below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
NOV 4 1974
MICHAEL RODAK, JR., CLERK

No. 73-1106

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court

REPLY BRIEF FOR PETITIONERS

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On Writ Of Certiorari To The Illinois Appellate Court

REPLY BRIEF FOR PETITIONERS

ARGUMENT

In view of the extensive brief previously submitted by petitioners (hereinafter called petitioners' principal brief), this reply brief will be limited to the major points raised in the brief filed by respondents.

I.

The Injunctive Orders of the Circuit Court of Cook County Were Barred by the Outstanding Judgment of the Court of Appeals (Which Had Been Stayed But Not Vacated By This Court) in Keane v. National Democratic Party.

In response to petitioners' contention that the injunctive orders of the Circuit Court of Cook County were barred at the time of issuance by the outstanding judgment in *Keane* v. *National Democratic Party* (see pp. 23-48 of petitioners' principal brief), respondents make three arguments: (1) that the Court of Appeals for the District of Columbia had not adjudicated the claim which was the basis of respondents' subsequent state court proceeding (pp. 69-72 of respondents' brief); (2) that "the purpose and result of the stay [issued by this Court on July 7, 1972] was to enable the Illinois court, time permitting, to hear respondents' claim under state law" (pp. 67-69); and (3) that any *res judicata* bar upon the Illinois state court proceedings as a result of the prior adjudication of the issues in respondents' Federal court action "would have been contrary to considerations of comity and federalism expressed in 28 U.S.C. § 2283 and would have totally ignored the opinion of the Court of Appeals for the Seventh Circuit in *Cousins* v. *Wigoda*, 463 F.2d 602 (1972), application for stay denied, 409 U.S. 1201 (1972)" (pp. 68-69). Each of these responses is invalid.

A. The Court of Appeals for the District of Columbia expressly adjudicated, and rejected, respondents' claim that because petitioners had not been selected in accordance with state law, petitioners could not lawfully be seated in the 1972 Democratic National Convention.

In their effort to demonstrate that the Court of Appeals for the District of Columbia had "expressly not decided"

the claim which was the basis of the subsequent state court orders, respondents wrench out of context two statements made by the Court of Appeals.

Respondents' first (at p. 70 of their brief) quote the Court of Appeals as stating:

> "No violation of Illinois law is at issue here."

In fact, the Court of Appeals made that statement in the context of considering, *and expressly rejecting*, respondents' contention that because they, and not petitioners, had been elected in accordance with Illinois law, the 1972 National Convention could not seat petitioners in the Convention. The full quotation from the Court of Appeals reads as follows (the portions omitted by respondents are in italics):

> "*The challenged delegates* [respondents] *claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the challenged delegation.* No violation of Illinois law is at issue here. *The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. The guideline compelments the Illinois law in an area—selection of delegate slates—where the state law is silent. The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself.*" (A.-54.)

As the Court of Appeals notes, respondents pleaded and argued in the Federal court the claim which was the basis

of the subsequent state court proceeding. (See also respondents' complaint in the Federal court action quoted at p. 9 of petitioners' principal brief).

Respondents then quote out of context (at p. 70 of their brief) language of the Court of Appeals in which the Court discussed the decision of the District Court not to enjoin proceedings in the Illinois court. In the full quotation, however, the Court of Appeals goes on to *disagree* with the District Judge and to note that its own judgment did involve an adjudication, *and rejection,* of the basis for the state court proceeding. The full quotation from the Court of Appeals reads as follows (portions omitted by respondents are again in italics):

> "Judge Hart based his denial of the counterclaim on the grounds that the question of the legality of the slate certified by the Credentials Committee in lieu of the plaintiffs was not before him, and that there was no justiciable issue presented in this action concerning the eligibility of the members of that slate to represent the Illinois districts in question.
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> "In so ruling Judge Hart seems to have focused solely on the state law claims which apparently are the basis of the state proceeding, and which were not before the District Court here. *However, in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law. Proper resolution of the ultimate issues raised in the state proceeding would thus require consideration of both sets of requirements, and the interests of judicial efficiency, coupled with the rapidly expiring time remaining before the start of the Convention, call for resolution of those issues in one forum."* (A.-57-58.)

The Court of Appeals, in language not quoted by respondents, went on to make even more explicit that it had adjudicated, and rejected, the claim which was the basis for the subsequent state court orders appealed from herein, and the Court of Appeals issued an injunction against continuation of the Illinois proceedings. The Court of Appeals stated:

> *"The Resolution of the Committee which we have here approved provides that the 59 plaintiffs in this suit are not to be seated as the delegates to the Convention from their districts in Illinois. It also provides that 59 other persons shall be seated as the delegates from those districts.* In order to protect *our judgment approving this Resolution,* it is necessary to enjoin plaintiffs from taking any action in any other court that would impair the effectiveness and the integrity of the judgments of this Court.
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> *"If plaintiffs were successful in their state proceedings one likely result would be that no delegates from the challenged Illinois districts could be seated at the Convention. Such a result would not just deprive the National Party of the participation of those persons whom it has selected to fill those delegate seats, more fundamentally it would deprive all Democrats residing in those districts of any voice or representation in the process by which their party's candidate for the Presidency is selected.* The immediacy of this injury is clear—the Convention begins in five days—and after that the injury is wholly irreparable.
>
> "We also consider that the unique situation presented by these two cases, all interested parties represented in the federal forum and a critical party missing from the state forum; this court's familiarity with the complex of issues involved—bred and nurtured in the consideration of both the California and Illinois

challenges; both actions commenced in the separate forums by the same class of plaintiffs; and the rapidly expiring time within which any judicial action is possible—amply provide the extraordinary and unusual circumstances that call for equitable relief. For the foregoing reasons we reverse the District Court's denial of the National Party's Counterclaim, and we accordingly enjoin the Illinois plaintiffs from taking action in any other Court that would impair the effectiveness and the integrity of the judgments of this Court." (A.-60-61.) [Emphasis added]

Respondents' effort to show the contrary notwithstanding, there is simply no doubt or question about the fact that the Court of Appeals for the District of Columbia on July 5, 1972 adjudicated, *and rejected,* the precise claim which respondents subsequently asserted as the basis for the injunctive orders of the Circuit Court of Cook County appealed from herein.

B. This Court's stay order of July 7, 1972 did not have "the purpose and result" of enabling an Illinois court to relitigate the issues previously adjudicated in Keane v. National Democratic Party.

Respondents contend (at p. 67 of their brief):

> "In view of the history of the case at bar, the purpose and result of the stay [issued by this Court on July 7, 1972] was to enable the Illinois court, time permitting, to hear respondents' claim under state law."

This contention of respondents, which is critical if they are to justify the subsequent orders of the Circuit Court of Cook County, is directly contrary to (a) explicit and well-established law on the effect of a stay of a Federal judgment and (b) the express language of this Court's *per curiam* opinion of July 7, 1972.

The law is well-established on the effect of a stay of a Federal judgment. Such a stay "suspends execution of the judgment, but not its conclusiveness in other proceedings." 1 B. Moore's Federal Practice § 0.416 (3) at p. 2252. (See cases cited at pp. 28-33 of petitioners' principal brief.) Respondents make no effort to deal with this well-established authority.

Respondents' contention might have more plausibility if there were even a hint in this Court's opinion of July 7, 1972 that it intended its stay order, contrary to the established law, to permit relitigation of the issues in an Illinois state court. On the contrary, however, this Court's opinion of July 7, 1972 stated that this Court was acting in light of the "large public interest in allowing the political processes to function free from judicial supervision." Throughout its opinion this Court emphasized that it was acting to permit the Chicago and California challenges to be decided not by any court but by the National Convention itself, noting that "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (A.-68.) This Court stated that its stay order "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its credentials committee." (A.-68.)

Respondents state (at p. 73 of their brief) that:

> "There would have been no purpose for this Court's stay if not to permit respondent to proceed in the state court."

This statement wholly ignores this Court's *per curiam* opinion which gave the reasons for the Court's stay of the California and Illinois judgments of the Court of Appeals:

to permit the political processes of the National Convention "to function free from judicial supervision."*

Respondents are in the position of arguing that this Court's stay order had "the purpose and result" of permitting the subsequent Illinois court proceedings although (a) the stay order did not have that effect as a matter of well-established law (which respondents do not attempt to controvert) and (b) this Court stated in its *per curiam* opinion that it was acting to permit the 1972 Democratic National Convention, and not the courts, to decide the Chicago and California contests. Respondents make the extraordinary statement (at p. 75 of their brief) that:

> "It would demean the Supremacy Clause if it were employed to compel a state court to recognize a stayed and subsequently vacated judgment which this court had strongly criticized prior to the time the state's order was issued."

This Court had not, in fact, "strongly criticized" the judgment in the Chicago case but, rather, had indicated tentative agreement with the dismissal of respondents' complaint (although on grounds different from those advanced by the Court of Appeals); in the California case, in contrast, this Court had indicated disagreement with the lower court's decision to grant judicial relief. In any event, however, the supremacy clause does, indeed, compel

*The dissenting Justices, who favored judicial resolution of the issues on the merits prior to the Convention, were equally clear that the effect of this Court's stay was to allow the National Convention to decide the contests. There is no hint in the opinion of any Justice that "the purpose and result of the stay" was, as respondents contend, to allow an Illinois state court to consider respondents' claims.

a state court to recognize an outstanding Federal court judgment, and neither the fact that the judgment was stayed, nor the fact that it was subsequently vacated, in any way alters that fact.

In the end, the sole basis for respondents' contention that the Illinois court orders were not barred by the prior outstanding Federal judgment seems to lie in the fact that respondents were not *enjoined* from proceeding in the Illinois courts.* Indeed, throughout their brief respondents confuse the question of whether the prior Federal court decisions had the legal effect, as a matter of *res judicata*, of barring subsequent action in the Illinois court with the question of whether respondents were *enjoined* from continuing other court proceedings. Unless respondents were enjoined from proceeding elsewhere, they seem to be saying, the Illinois courts were free to act, notwithstanding the *res judicata* effect of prior decisions. This contention reflects a total misunderstanding of principles of *res judicata* which have nothing to do with whether proceedings have been *enjoined* by another court. It is only in the most unusual circumstances that a Federal court will enjoin pending state proceedings (see, *e.g.*, *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (opinion of Mr. Justice Rehnquist, in Chambers)). The absence of such an injunction does not in any way indicate that the orders appealed from herein were not barred, as a matter of *res judicata*, by the prior Federal judgment.

*The Court of Appeals had enjoined the Illinois proceedings on July 5, 1972. However, this Court's stay order, as construed by the Court of Appeals, had the effect of staying that injunction. See respondents' brief, Appendix E at A.-17.

C. The decision of the Court of Appeals for the Seventh Circuit in Cousins v. Wigoda, 463 F.2d 602, application for stay denied, 409 U.S. 1201 (1972), and considerations of comity and federalism, in no way supported relitigation of the issues in an Illinois state court after a judgment on the merits, adverse to respondents, had been entered in the Court of Appeals for the District of Columbia.

Respondents contend (at p. 68 of their brief):

> "To have barred the state court in the instant case would have been contrary to considerations of comity and federalism expressed in 28 U.S.C. § 2283 and would have totally ignored the opinion of the Court of Appeals for the Seventh Circuit in *Cousins* v. *Wigoda,* 463 F.2d 602 (1972), *application for stay denied,* 409 U.S. 1201 (1972), mandating to the Illinois state court questions under state law concerning delegate selection."

In fact, the decision of the Court of Appeals for the Seventh Circuit, and Mr. Justice Rehnquist's subsequent denial of an application for stay of that decision, were rendered *prior* to the adjudication on the merits in the Federal court proceedings commenced by respondents on July 3, 1972. The issue in the earlier Seventh Circuit case was whether, prior to any decision on the merits in any court, respondents' state court action could be enjoined by a Federal court on the ground that respondents' effort to bar participation by petitioners in the political process was so flagrantly invalid and frivolous as to amount to harassment and interference with First Amendment rights justifying a Federal injunction (see p. 15 of petitioners' principal brief). A Federal District Court in Chicago so held. The Court of Appeals for the Seventh Circuit (in a 2-1 decision) reversed, noting, among other things, that

"the partial stay of the state proceedings cannot be justified by mere speculation that an Illinois Chancellor might commit flagrant error." 463 F.2d 600, 608 (7th Cir. 1972).* Mr. Justice Rehnquist, citing principles of Federal-state comity and his limited authority as a single Justice, declined to stay the judgment of the Court of Appeals. 409 U.S. 1201 (1972).

Those prior decisions on the propriety of a Federal injunction against respondents' state court proceeding, prior to any adjudication on the merits, have no bearing upon the question of the *res judicata* effect of the judgment on the merits entered by the Court of Appeals for the District of Columbia on July 5, 1972. There is no basis whatsoever for respondents' contention (at p. 72 of their brief) that "*Cousins,* which specifically authorized Wigoda to proceed in the state court, and not *Keane,* is the controlling prior judgment."**

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*Contrary to respondents' intimations, the Seventh Circuit in no sense indicated any agreement with the proposition that the state court might *enjoin* participation by petitioners in the Convention. The Seventh Circuit held that an injunction against the state proceedings was improper under doctrines of comity "assuming without deciding that the state complaint contains a frivolous and overly broad prayer for relief which, if granted *in haec verba,* would impair the First Amendment rights of Cousins, et al." 463 F.2d at 608.

** At one point (p. 70 of their brief), respondents suggest that the decision of the Court of Appeals for the District of Columbia did not have *res judicata* effect because the Court acted "without hearing any evidence," particularly as to the manner in which petitioners were selected. As indicated in the earlier quotations, the Court of Appeals held that it was unnecessary to hear evidence as to whether petitioners had been selected in accordance with state law because, conceding that petitioners were selected *contrary* to state law, the National Convention could impose requirements "separate from and in addition to those imposed by state law." (A.-58.)

D. Respondents totally ignore the decision of the Court of Appeals for the District of Columbia on February 16, 1973, on remand from this Court, reaffirming the dismissal of respondents' complaint and stating that the 1972 Democratic National Convention "acting within its competence" seated petitioners in the Convention.

As set forth in petitioners' principal brief (at p. 13), on February 13, 1973, the Court of Appeals for the District of Columbia, on remand from this Court, reaffirmed the dismissal of respondents' complaint against the seating of petitioners in the 1972 Democratic National Convention. The Court of Appeals stated that the 1972 National Convention "acting within its competence" seated petitioners as the Chicago delegates and that respondents' complaint "thus became and is now moot." 475 F.2d 1287, 1288.

Respondents sought to have the Court of Appeals vacate the prior judgment dismissing their complaint, but the Court of Appeals refused to do so and instead, the Court of Appeals affirmed again the judgment dismissing respondents' complaint (see p. 13 of petitioners' principal brief). That action of the Court of Appeals clearly preserved, even after February 16, 1973, the *res judicata* effect of that judgment of dismissal. See *United States* v. *Munsingwear,* 340 U.S. 36 (1950), discussed at pp. 37-38 of petitioners' principal brief. Respondents make no effort in their brief to distinguish this clear authority on the effect of the Court of Appeals' action.

II.

The Action of the Illinois Court in Purporting to Enjoin Petitioners from Participating as Delegates in the 1972 Democratic National Convention Is Without Precedent and Contrary to the Historical and Constitutionally Protected Freedom of Citizens to Engage in National Political Party Affairs.

Respondents' brief highlights the unprecedented character of the injunctions issued by the Illinois court. Respondents cite no case in the 150-year history of National Party Conventions in which any court, state or Federal, has ever before purported to *enjoin* anyone from participating in such a Convention. Nor do respondents cite any authority for the proposition of the Illinois Appellate Court that state law "exclusively governs" the granting of credentials to National Party Conventions, thereby justifying such an injunction.

If the Illinois Appellate Court is correct that state law "exclusively governs," then the historical right of the National Parties to grant credentials to delegates to their conventions, on the basis of their own national rules, standards and principles, is abrogated. In the California, Illinois and Missisippi contests at the 1972 Democratic Convention, for example, only the persons chosen in accordance with the state law, and not their challengers, could lawfully have been seated in the National Convention—regardless of the decisions made by the assembled delegates to the National Convention as to whom they regarded as the National Party's legitimate representatives from those states.

The right of citizens of any state to challenge and replace proposed delegates to a National Convention who have engaged, as respondents were found to have done, in "covert, calculated and deliberate" violation of National Party rules and principles is basic to the free political activity of National Political Parties. When such challenges are made, as this Court stated in *Keane*, "it has been understood since our national political parties first came into being as voluntary associations of individuals that *the convention itself* is the proper forum for determining intra-party disputes as to which delegates shall be seated." (A.-67) [Emphasis added]

In both 1964 and 1968, for example, the Democratic National Convention refused on "loyalty" grounds to seat delegates elected in accordance with Alabama law. Respondents suggest (at pp. 64-66 of their brief) that the "loyalty issue" would somehow be distinct as a legal matter from other types of national rules and principles. How this could be so is mystifying unless we are to have a situation in which the courts of the 50 states will each weigh the National Party interests at stake and decide whether they are "sufficient" to justify a National Party's decision on any particular credentials contest. In any event, it is difficult to see how there could be any more dramatic instance of disloyalty to the National Party than the "deliberate, covert and calculated" violations of National Party Rules by respondents which the National Democratic Party found to have taken place in 1972 (see the Hearing Examiner's Report at A.-22).

As another example, at the 1912 Republican Convention delegates elected in accordance with California law were rejected and challengers seated. Respondents (at p. 63 of their brief) say that this was an improper, "political" outcome. They contrast it with the action of the 1912 Democratic National Convention which decided to reject (by a vote of 639½ to 437) a challenge to delegates elected in accordance with South Dakota law. But it is irrelevant that respondents disapprove of the result in the 1912 California contest at the Republican Convention and approve of the result in the South Dakota contest at the 1912 Democratic Convention. The point is that both parties exercised their right to decide these contests and grant credentials to their Conventions on the basis of their own National Party rules and principles, political commitments, and the other circumstances of such contests, involving, as this Court noted in *Keane*, "relationships of great delicacy and essentially political in nature." (A.-69.)

Moreover, it is difficult to see any basis on which the holding of the Illinois Appellate Court could be limited to states which have established a direct election process for the selection of National Convention delegates. For example, in Mississippi in both 1968 and 1972 a set of delegates was chosen in accordance with a process under state law which involved the initial election of delegates to county conventions who in turn chose delegates to a statewide convention, which then chose National Convention delegates. If state law "exclusively governs" the granting of credentials to National Convention delegates, then a Mississippi state court could have enjoined participation in the Democratic National Convention of the challenging delegations which were actually seated. This point was made explicitly by the National Democratic Party in its brief to this Court prior to the 1972 Convention:

> "Plaintiff [respondents] contends that the right to judge delegate credentials can be totally abrogated by state primary laws. Such an argument is broad indeed. It would mean that as to the approximately half the states with primary laws, the national party may not as a practical matter enforce any rules binding on the state parties. It would mean that where delegates have been elected by a primary, the national party must seat those delegates even if they were nominated by procedures that flagrantly excluded blacks, other minority groups, women, or other persons on a discriminatory basis. It would mean that such delegations would have to be seated even if the nominating procedures excluded the vast majority of rank-and-file party members. It would mean they had to be seated even if they were elected by cross-over voters from another party, who openly stated that they were attending the convention only to sabotage the party. . . .

"Moreover, the logic of plaintiff's argument would carry far beyond primaries. A well-conducted state convention can produce results as democratic as those produced by a primary. If it violates the rights of primary voters to challenge credentials of delegates, to do so would equally violate the rights of those who elected delegates to a state convention. And thus the effect of plaintiff's argument would be to eliminate the credentials challenge procedure entirely, after nearly a century and a half of unchallenged use, and turn the national party into a helpless organism unable to enforce any fairness, standards or ideological tenets on the state groups which take its name." Brief of National Democratic Party to this Court in *Keane* v. *National Democratic Party*, Appendix C at 32-33.

Respondents attempt to distinguish the Mississippi challenges on the ground that "the challengers alleged and proved systematic, invidious discrimination against black participation in the Democratic party of the state" (respondents' brief at p. 58). Again, even if one could accept the notion that it is possible to somehow pick and choose as a legal matter among different possible grounds of credentials challenge, this distinction would be invalid because the Hearing Examiner whose report on the 1972 Chicago challenge was adopted by the Convention found "substantial and invidious discrimination" (A.-38.) by the Chicago Democratic party against racial minorities, women and young people.

In Georgia in 1952, the Republican National Convention —in a decision which respondents wholly ignore—seated a contesting Eisenhower delegation in the face of an express judgment of a state court of Georgia that the Taft delegation was the "lawful Republican party in Georgia" (petitioners' principal brief at pp. 58-60). Respondents' effort to deny that the National Parties have expressly asserted their right to decide contests and grant credentials to delegates regardless of state law is wholly controverted by the comments made by the majority spokesmen in that debate. *E.g.*, Remarks of Gordon X. Richmond of California:

"I believe that this national convention is absolutely the last authority, the Supreme Court in deciding who shall have credentials to this convention, and it shall not be dictated to by the state court of Georgia or by any other court." 1952 Republican Proceedings at p. 168.*

Petitioners submit that it is clear that both National Parties have asserted and have exercised as a central feature of their free political activity the right to decide contests and grant credentials to delegates to their National Conventions, regardless of whether those delegates have been selected in accordance with a state law. The holding of the Illinois Appellate Court that state law "exclusively governs" in such cases would radically alter the historically exercised and, petitioners submit, constitutionally mandated freedom of citizens to engage in National Political Party affairs.

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* Respondents attempt to undermine the similar remarks of Judge Daniel Hastings at the 1928 Republican Convention by noting (at p. 60 of their brief) that he was speaking for a minority report. As noted in petitioners' principal brief (at p. 58), however, Mrs. Mabel Walker Willebrandt, the chairman of the Credentials Committee, immediately agreed with Judge Hastings that "the Republican national convention makes its own laws." The further remarks of Mrs. Willebrandt (quoted by respondents at pp. 60-61 of their brief) are directed to demonstrating that under the circumstances of the contest there was no conflict between the result under the rules of the National Republican Party and the Texas state law.

III.

The Right of the State of Illinois to Conduct Its Own Electoral Processes Is Not at Issue in This Case; Rather, the Question Is Whether a State May Declare That Its Law Is "Exclusive" and Bar the Application of National Rules and Principles Established By a Political Party to Govern the Granting of Credentials to Its National Party Convention.

A major portion of respondents' brief (pp. 23-55) is devoted to the proposition that the actions of petitioners, the Democratic Party's Credentials Committee and the 1972 Democratic National Convention somehow interfered with Illinois' right to conduct primary elections.

However, it was the *pre-primary* slating and other electioneering activities of respondents, including racial discrimination and closed and secret slate-making, which petitioners contested and which the Hearing Examiner, the Credentials Committee, and, ultimately, the Democratic National Convention found to have violated the rules of the National Democratic Party. Respondents' argument is thus reduced to the proposition that, so long as an election takes place, the National Democratic Party is wholly without power to enforce any rules or principles governing the pre-primary or other activities of potential delegates to its National Convention.*

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* "Though duly elected in district primaries, these delegates [respondents] had been slated, which is to say, selected as nominees with party endorsement, by procedures that were effectively proof against insurgency, or against participation by outsiders, as insurgency is now called. . . . Their [respondents'] chief argument was that election cures all. It is, in their view, a kind of absolution. But the delegate-selection requirements, unlike some more demanding precept systems, do not provide for absolution, by election or otherwise." A. Bickel, "Will the Democrats Survive Miami?" 167 *New Republic* 17, 18 (July 15, 1972).

The result urged by respondents would be inconsistent with the principles expounded by this Court in such cases as *Smith* v. *Allwright,* 321 U.S. 649 (1944), and *Terry* v. *Adams,* 345 U.S. 461 (1953). In both cases, the Democratic Party engaged in pre-election activities which were found by this Court to have violated the constitutional rights of blacks. The mere fact that an election was interposed subsequent to the actions of the Party was held by this Court to be insufficient to insulate the constitutionally-forbidden activities of the Party from scrutiny. The instant case is directly analogous. As the National Democratic Party stated prior to the 1972 Convention:

> "Just as a state may protect its interest in the proper conduct of its elections by narrowly and precisely drawn rules, so the National Democratic Party may use its credentials challenge procedure to protect its interest in ensuring that the procedures by which national convention delegates are selected faithfully reflect the views of all interested party members. If plaintiff or others of his slate [respondents] are denied seats at the Democratic National Convention, it will be because the group calling itself the Democratic Party of Illinois did not follow the rules of the National Party and did not give party members in Illinois a full and meaningful opportunity to have their voices heard at all critical stages of the delegate-selection process. If, as the Hearing Officer found, the steps leading up to the actual election had the effect of improperly distorting the choices presented to the voters, then the vote itself is not entitled to be regarded as sacrosanct by the party. The right to vote has little meaning if the vast majority of voters are excluded from the crucial stages leading up to the election. That is the teaching of *Smith* v. *Allwright, supra,* and *Terry* v. *Adams, supra.*" Brief of National Democratic Party to this Court in *Keane* v. *National Democratic Party,* Appendix C at 34-35.

Decisions of this Court such as *Storer* v. *Brown*, 415 U.S. 724 (1974) and *American Party of Texas* v. *White*, 415 U.S. 767 (1974) (cited by respondents at pp. 25-26 of their brief), which establish a state's right to regulate and restrict, within constitutional limits, access to its election ballot, do not address at all the interests involved in the political processes of a National Party Convention and give no support to the decision of the Illinois Appellate Court in this case. There is nothing in those decisions which suggests that a state may declare that its own electoral laws are "exclusive" in relation to the political processes of a National Political Party, thereby denying to citizens the right to assert through such national political processes the rules and principles established by a National Political Party to govern the granting of credentials to its National Conventions.

IV.

The State of Illinois Had No "Compelling Interest" Which Justified the Injunction Against Petitioners' Participation in the 1972 Democratic National Convention.

Respondents contend throughout their brief that the injunctions against petitioners were justified by a "compelling state interest" in "protecting the integrity of the Illinois electoral process." (pp. 23-35.) What respondents describe as an action by the State of Illinois "to protect the integrity of its electoral process," however, is an injunction which had the practical effect of either (a) requiring the National Democratic Convention to seat as delegates persons who had been found to have deliberately violated National Party Rules against discrimination and against closed and secret slatemaking or (b) preventing the seating of any delegates from the Chicago districts in the 1972 Democratic National Convention.

As discussed above, the rules of the National Democratic Party (upon which petitioners based their challenge) were not in themselves inconsistent with the Illinois state law. Rather, they were designed to supplement the Illinois law in relation to matters—particularly pre-primary slating activities—deemed by the National Democratic Party, after an extensive rule-making process, to be of special importance to achieving full participation in the delegate selection process. As the Court of Appeals for the District of Columbia stated when respondents' claims were before it:

> "The process by which candidates for an office are endorsed can be just as integral a part of the ultimate election as is the election itself. The Supreme Court established that principle in Terry v. Adams, 345 U.S. 461 (1953), and it applies as well with respect to the process for choosing convention delegates. *The Democratic National Party determined to make participation in the nomination process as democratic as possible. This exercise of the Party's power over the qualifications of the delegates to its convention was pursuant to a reasonable regulation calculated to achieve a permissible, indeed laudable, end.*" (A.-53-54.) [Emphasis added.]

Ultimately, the only way citizens of any state have to enforce National Political Party rules and principles is to contest the seating of delegates who have violated those principles. In this case the National Democratic Party determined, after an extensive hearing and debate in the Credentials Committee and the Convention, to uphold petitioners' challenge on that ground. Under the decision of the Illinois Appellate Court, however, the Convention "lacked power or authority" to deny respondents their seats in the Convention. Respondents defend this result by saying that it was based upon a "compelling state in-

terest." But the State of Illinois clearly has no legitimate and compelling state interest in preventing enforcement of National Party Rules against racial discrimination or against closed and secret slatemaking by local party officials. The most that can be said of the Illinois court decision is that the court would have balanced the interest of the National Party in enforcing those rules and principles against the other interests involved in the contest, including the results of the primary election—which was, of course, at the heart of the political debate over how to resolve the contest—and would have come out differently. But this is clearly a matter of policy to be decided by the National Party.* Disagreement with the results of the National Party's decision does not represent a "compelling state interest" which can justify an injunction of the type issued in this case.

The alternative result of the Illinois court injunction was that the Convention would seat no one to represent the Chicago districts. Respondents state (at p. 46 of their brief) that "this result would be preferable" to the seating of petitioners. From the standpoint of respondents' own political intereststs, that judgment may be understandable. But it is difficult to see what "compelling state interest" of the State of Illinois would have been served by depriving Chicago of any representation in the 1972 Democratic National Convention. This is precisely the situation

* It should be noted that the balancing of interests involved could be, and was, argued to support various compromise results. As noted in petitioners' principal brief, a last-minute motion was made in the National Convention to split the delegation 50-50 between the two competing factions.

discussed by the Federal District Court in *Riddel* v. *National Democratic Party* (a decision never mentioned by respondents). After that court had determined that the "regular" Mississippi delegation had been selected in accordance with Mississippi law, and the challengers had not, the court was asked to enjoin participation by the challengers in the 1972 Democratic National Convention. The court denied that relief stating:

> "Part of the relief requested here is to enjoin the so-called 'Loyalists' from participating in the National Democratic Convention but to do so would serve no plausible purpose. To do so would prohibit each and every democrat in Mississippi from having a voice in the selection of a candidate for President and Vice-President of the United States to run as a National Democrat.
>
> "To refrain from enjoining the Loyalists would at least grant each and every Democrat in Mississippi the privilege or right to speak through some group to the National Convention. The group selected might not voice the opinion of the majority of the electorate of Mississippi, but if not, that is the selection of the national organization, and the national organization takes its political risk—whether the potential stakes are good, bad—or just political." 344 F. Supp. at 923.

Respondents seek throughout their brief (see pp. 17-21; 46) to focus attention on the composition of the alternative Chicago delegation (petitioners) which the National Democratic Party decided to seat in its 1972 Convention. Respondents attach as an appendix to their brief (Appendix D) an article by Mike Royko, a Chicago newspaper columnist, in which he criticizes the challenge delegation for lacking sufficient "white ethnic" representation. What legal significance is thought to attach to the Royko article or to respondents' other particular objections to the chal-

lenge delegation is obscure. It has never been disputed that petitioners (like the 1972 California and Mississippi challenge delegations and, indeed, like virtually every other challenge delegation in the history of credentials contests) were not chosen in accordance with state law.

The Royko article does, however, suggest the flavor of the political debate in 1972 over which Chicago delegation should be seated. Respondents circulated thousands of copies of the Royko article among the delegates to the Miami Convention and made the same point in argument before the Credentials Committee and the Convention. Petitioners, on the other hand, also distributed copies of articles and editorials, which were exhibits to petitioners' briefs before the Democratic Credentials Committee, supporting their charges that respondents had attempted by mob action and violence to disrupt the caucuses called by the challengers to choose an alternative Chicago delegation.*

Petitioners argued that they, and not respondents, were the loyal Chicago Democrats committed to non-discrimination and other National Democratic Party principles and opposed to the kind of closed and discriminatory practices which they alleged (and the Hearing Examiner found) to be characteristic of respondents. The alternative delegation included Chicago civil rights leaders (such as Albert Raby and Rev. Jesse L. Jackson), Chicago aldermen, members of the Illinois Governor's staff, state legislators, leaders of local community groups and others, all of whom were persons who had *not* violated the rules and

* See Appendix I to this Reply Brief: "Chicago's Own Stormtroopers," Chicago Today (June 25, 1972); Appendix II: "Muscle Politics," Chicago Sun-Times (June 24, 1972); and Appendix III: "Daley's People Make A Point," Chicago Daily News (June 24, 1972).

principles of the National Democratic Party (see p. 8 of petitioners' principal brief). In addition to the Party's announced rules and principles, of course, the delegates to the National Convention were faced with arguments concerning the National Democratic Party's own political interests, both immediate and long-term, in resolving the contest and both factions argued that they represented the best future for the Democratic Party in Chicago. Various compromise solutions, such as splitting the delegation between the two factions (as had been done in many past credentials contests), were widely discussed.

Respondents may believe that "it would be preferable" if the National Democratic Party had seated no one to represent Chicago in its 1972 Convention. But petitioners submit that no court, in Illinois or elsewhere, sits to pass such a judgment upon the wisdom of a decision made by the National Democratic Party or any other political party on this or any other credentials contest. Except possibly in extraordinary circumstances (such as deliberate racial discrimination) clearly not present in this case, the citizens who choose to associate together in a National Political Party have the right to make such decisions for themselves.

V.

No Violation of the Constitutional Rights of Respondents Is Involved in This Case.

Respondents devote a substantial portion of their brief (pp. 23-33) to the general proposition that this case involves a Federally-protected "right to vote."* This claim

*Although respondents emphasize the "right to vote," this case was *not* brought on behalf of any voters. Rather, the complaint was filed solely on behalf of the "challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention" from Chicago (A.-1-2).

is extraordinary, particularly in view of the fact (discussed at pp. 89-90 of petitioners' principal brief), that respondents have previously argued vigorously that their complaint did not raise *any* Federal questions.

When respondents' complaint was filed in the Circuit Court of Cook County, petitioners sought to remove the case to the Federal District Court for the Northern District of Illinois on the ground that a Federal question was presented therein. Respondents successfully obtained a remand order to the state court on the ground that any Federal constitutional issues presented in the case arose solely in defense. Respondents' motion for remand to the state court stated that "[p]laintiff's action was commenced in the Circuit Court of Cook County for a declaration of rights and injunctive relief under state statutes. . . . No federal question is presented by the complaint." Motion for Remand, p. 2, filed April 24, 1972 in *Cousins* v. *Wigoda*, 342 F. Supp. 82 (N.D. Ill. 1972).

As noted in petitioners' principal brief, Federal District Judge Hubert L. Will, in remanding the case to the state court, stated that the controversy should be decided by the National Convention and not the courts and, further, that "it is difficult to imagine any thoughful court granting the type of relief requested" [an injunction against petitioners]. (A.-16.) Whatever view is taken of these comments of Judge Will on the merits of respondents' complaint (which respondents describe, at p. 7 of their brief, as "gratuitous"), it is clear that Judge Will's opinion constituted a holding on the merits, affirmed by the Court of Appeals for the Seventh Circuit, that respondents'

complaint did not raise a Federal question.* The holding that the complaint does *not* raise a Federal question is clearly the law of this case. See, *e.g.*, *Insurance Group Committee* v. *Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947); *Messinger* v. *Anderson*, 225 U.S. 436, 444 (1912). See also *United States* v. *United States Smelting, R. & M. Co.*, 339 U.S. 186, 198 (1950).

Setting aside that preliminary matter, neither respondents nor the Illinois Appellate Court set forth any theory on the basis of which the actions of petitioners—or even the actions of the National Democratic Party (which, it should be noted, has never been a party to this action)—might be deemed to constitute "state action" within the meaning of the Fourteenth Amendment. Indeed, respondents state (at p. 47 of their brief):

> "In the context of the instant case it is not necessary to determine whether the Convention action is 'state' action within the meaning of the Fourteenth Amendment."

Nevertheless, respondents cite a panoply of cases (at pp. 25-34 of their brief) dealing with Federal constitutional rights in the electoral context, all of which depend upon the basic premise that "state action" is involved. In the absence of "state action"—and it is difficult to see any basis upon which the activities of petitioners, a group of private citizens, could be so regarded (see pp. 90-91 of

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* The Court of Appeals affirmed the remand order *per curiam* (No. 72-1384, 7th Cir., June 30, 1972), stating that "the reasoning and result set forth in the memorandum opinion of the district court is now adopted as the opinion of this Court and the order of the district court is affirmed. . . ." The Court of Appeals added the notation that "[w]e express no opinion as to the effect of state law on the determination of proper delegates to the Convention."

petitioners' principal brief)—the cases cited by respondents simply are not applicable.

Setting aside the critical issue of "state action" as well, petitioners submit that respondents offer no plausible rationale for the proposition that the actions of the National Democratic Party in seating petitioners in the Convention were unconstitutional. Respondents apparently do not seek to resurrect their claim (rejected by the Court of Appeals for the District of Columbia) that the National Party Rules involved in this case were unconstitutional. (A.-51-57.) Nor do they seek to defend the contentions of the Illinois Appellate Court that the Hearing Examiner's Report and the other procedures of the National Democratic Party in relation to the Chicago contest violated "due process."

In the end, all that respondents' "constitutional" claim amounts to—assuming their complaint had raised Federal issues and assuming "state action" were demonstrated—is a reassertion of the proposition that the Illinois electoral law "exclusively governed" the granting of credentials to Illinois convention delegates.

VI.

The Injunctive Relief Granted By the Circuit Court of Cook County Constituted an Impermissible Prior Restraint Upon the Freedom of Association of Petitioners.

Respondents in their brief fail to address themselves to the nature of the drastic, last-minute, and wholly unprecedented relief granted by the Circuit Court of Cook County—namely, an *injunction* against petitioners' participation in the Democratic National Convention as delegates from Chicago even if the Convention should decide, as it ultimately did, that petitioners were entitled to be seated.

As noted in petitioners' principal brief (at pp. 71, 76) declaratory relief as to which of two contesting National Convention delegations was chosen in accordance with state law is not totally without precedent. See, e.g., *Riddell* v. *National Democratic Party*, 344 F. Supp. 908, 923 (S.D. Miss. 1972) (appeal pending, No. 72-2437, 5th Cir.). Petitioners do not suggest that any judicial relief was appropriate in this case, but if granted by the Illinois state courts, declaratory relief would have had a vastly less drastic impact upon the First Amendment rights of petitioners and of the National Democratic Party assembled in Convention. As Mr. Justice Marshall noted in *Keane*, "A declaratory judgment is a milder remedy than an injunction. . . ." 409 U.S. 1, 10 (1972) (dissenting opinion on application for stay). See also *Perez* v. *Ledesma*, 401 U.S. 82, 111 (1971) (separate opinion of Brennan, J.).

The injunctive relief granted by the Circuit Court of Cook County, issued immediately before the Convention opened, but prior to the time that the Convention had taken any action with respect to the Chicago challenge, constituted a type of prior restraint upon the exercise of First Amendment freedoms, including the freedom of association, which has been repeatedly condemned by this Court (see p. 71 of petitioners' principal brief). The effect of the purported restraint would have been to require petitioners to forego irrevocably their right to participate in the Convention in accordance with the decision of the assembled delegates. Thus, unlike other prior restraint cases decided by this court (*e.g. New York Times Co.* v. *United States*, 403 U.S. 713 (1971)), the restraint imposed by the injunction granted in the instant case would not merely have delayed for an indeterminate period the exercise of First Amendment rights, but rather would have

totally abrogated those rights. As Mr. Justice Harlan noted in *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 163 (1968) (concurring opinion):

> "[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."

Accord, *Carroll* v. *Commissioners of Princess Anne,* 393 U.S. 175, 182 (1968).

It has been well-established, at least since the decision of this Court in *Near* v. *Minnesota,* 283 U.S. 697 (1931), that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971), and cases cited therein. In *Carroll* v. *Commissioners of Princess Anne, supra,* which involved "a rally and 'political' speech in which the element of timeliness may be important" (393 U.S. at 182), this Court refused to sanction even a ten-day restraining order that merely would have delayed the holding of the political meeting that was enjoined. In the instant case, as noted, the injunctive relief granted by the Circuit Court of Cook County would not simply have delayed the exercise by petitioners of their constitutional rights; the injunction would have totally abrogated those rights.

If this Court should uphold the granting of such injunctive relief, then it is predictable that in virtually all future credentials contests there will be resort to the state courts for judicial relief. The brief of amici curiae notes (at pp. 35-36), for example, that the application of the National Democratic Party's "proportional representation" principle (adopted in 1972 to apply to future Conventions) is one likely source of future litigation; but

there will also be many others, in every party. On the eve of the National Convention, as the delegates assemble and political contests are at their most intense, it would be within the power of a state court to attempt to dictate the outcome of those political processes by issuing injunctions against participation in the National Convention. Petitioners submit that this kind of prior judicial restraint upon freedom of association is contrary to fundamental First Amendment principles and the injunctions issued by the Illinois court should be reversed for that reason alone.

CONCLUSION

For the reasons set forth in petitioners' principal brief and herein, petitioners respectfully pray that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX I

CHICAGO TODAY

Editorial, June 25, 1972

CHICAGO'S OWN STORM TROOPERS

Thursday, June 22, 1972, may rank as a historic day in Chicago politics—the day when the once awesome Democratic organization under Mayor Richard J. Daley booted away the reputation it had been building for 17 years. After the goon-squad raids by Democratic regulars on independent groups trying to caucus, it will no longer be possible to think of Daley and his top men as political geniuses. It may take some effort to think of them as moderately bright.

Hundreds of Daley loyalists invaded seven of the eight meetings called Thursday night by rival independent Democrats seeking to elect an "alternative" slate of delegates to the national convention. They broke up the meetings, bawled down speakers with the help of bullhorns, seized podiums and "elected" their own chairmen. In the course of these proceedings, they also beat up two men, roughed up others, pulled the hair of women delegates, held one caucus chairman in the meeting hall against his will, and kicked over quite a lot of furniture. For an organization in power, it was the most striking example of activist politics since Hitler fielded his storm troopers.

It is almost incidental to all this that the hoodlum tactics failed. The seven raided meetings simply moved elsewhere (the eighth was held in a private home), and the independents accomplished just what they had intended—choosing a 51-member alternative delegation.

The net effect of the loyalist raids was to strengthen the challengers' cause immeasurably while discrediting the Daley machine from top to bottom. And they could not conceivably have had any other result. The arrogance of this attempt to bully the dissidents into line is matched only by its stupidity.

Daley (assuming that he ordered the raids, and we can't see any other possibility) assigned to his own men the role of whip-wielding Cossacks riding down the peasants who dared to protest. And he didn't restrict this privilege to louts like Ald. Vito Marzullo [25th], who has no reputation to lose anyway. The strong-arm squads included men like Neil Hartigan, candidate for lieutenant-governor of Illinois; Matthew Danaher, clerk of the Circuit court, who is running for reelection; Ald. Michael Bilandic, who represents Daley's own 11th ward; and Richard M. Daley, the mayor's son.

Is there anything the Democratic organization could have done to weaken itself more drastically in an election contest or give its rivals a more spectacular boost? We are not yet accustomed to thinking of Richard J. Daley as a political dolt, but at this rate it won't take long.

APPENDIX II

CHICAGO SUN-TIMES

Editorial, June 24, 1972

MUSCLE POLITICS

In using beer hall putsch tactics to break up meetings of political rivals. Mayor Daley's organization Democrats have fallen back on muscle as their main argument in the difference of opinion over selection of delegates to the Democratic National Convention. They gave the appearance of the unruly 1968 convention all over again, disgracing themselves and Chicago.

Hundreds of Daley Democrats disrupted seven of eight meetings called to elect rival delegates to their slate to the Democratic convention. The Daley mob used bullhorns and in some instances strongarm tactics to try to prevent their political challengers from conducting their lawful business.

This was the second time this week meetings have been taken over by bullhorn-using storm troopers. The other one, Tuesday night, was, ironically, a meeting called by Daley establishment people to provide an audience for Police Supt. James B. Conlisk Jr. That takeover, accomplished by bullhorn, was by Renault Robinson and uniformed members of the Afro-American Patrolmen's League. There is no moral difference between what he did and what Mayor Daley's forces, including his own son, did Thursday night.

In both instances, the right of the people to peaceful assembly and free speech was denied through bully-boy tactics. The Thursday night raids were particularly pernicious because they were obviously directed by the party leadership and not the result of spontaneous reaction at the meetings.

Despite the effort of the regular Democrats to intimidate their rivals or prevent them from acting, the challengers, by adjourning the disrupted meetings and gathering elsewhere, managed to elect an alternate slate of 51 delegates to the convention.

Election was by those delegates defeated by Daly forces in the primary. The challengers will meet today to elect eight more delegates at large and they are entitled to police protection, if necessary, to prevent disruption.

Whether or not those persons can or will be substituted for the Daley delegates to the convention remains to be seen. The decision will be made by the credentials committee of the convention. The attempt to prevent the selection of the rival group certainly suggests the Daley Democrats are unsure of their own standing. On the other hand, there is no precedent for the selection of an alternative delegation through the means the rival group took. But they were entitled to hold their meetings and to proceed with their challenge.

The dispute grows out of new rules adopted by the Democratic Party requiring convention delegations to be widely representative of the citizenry, by sex, race and age. The Daley delegates do not meet the requirements but they insist they are qualified because they were elected in an open primary. The challengers say they were secretly slated and backed by the organization in violation of the new party rules.

Although they argue their delegation is authentic, Daley Democrats yesterday yielded to a ruling that their selections for the convention committees on platform, credentials and rules were out of order because they contained only four women and 14 men. They reshuffled the selections. Actually, according to Jacob M. Arvey, outgoing Democratic national committeeman, the Democratic State Central Committee last fall recommended to Illinois Democratic legislators that they change the statutory requirements to effect the reforms, which they did. The Daley people should have understood the new requirements.

To avoid the charge against themselves that they made against the Daley organization, the challengers opened their meetings to the public for discussion and nominations. The Daley people took advantage of this by storming in and trying to take over the meetings by electing their own chairmen. They claimed the challengers were voting undemocratically. But it was a case of the challenged trying to take over the machinery of their challengers.

This incident simply bolsters the general impression, held by many across the country that the democratic process does not function in Chicago, that elections are stacked and that rowdyism runs rampant.

APPENDIX III

CHICAGO DAILY NEWS

Editorial, June 24, 1972

DALEY'S PEOPLE MAKE A POINT

The tactics of Mayor Daley's organization stalwarts in busting up the meetings of rival Democratic challengers Thursday night were worthier of the Gashouse Gang than a modern political party. Using persuasive methods ranging from bullhorns to shoulders and fists, the "regulars" succeeded in breaking up seven out of eight meetings called to elect rival delegates to the Democratic National Convention.

Admittedly, the legalities are intricate. The Daley people contend that their slate of delegates was duly elected by the voters in an open primary and that ought to be that. The challengers say that the regular organization broke party rules in slating their delegates secretly and therefore the slate has no standing.

The struggle promises a lively session before the convention's credentials committee, and that's the place it should—and doubtless will—be finally adjudicated.

But there seems to be a point at which the Daley organization blows its lid in the face of challenge to its divine right to rule. And it is at that point, dependably, that any pretense to "democratic" process is shoved aside in favor of strong-arm persuasion.

A man from Mars might wonder how an organization so big on law-and-order could square this ready resort to the lead-pipe philosophy of persuasion.

But a man from Mars couldn't be expected to have a PhD in political science, Chicago-style.